

**CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY  
AIR RESOURCES BOARD**



**ADMINISTRATIVE HEARING OFFICE**

**STAFF REPORT: INITIAL STATEMENT OF REASONS FOR  
PROPOSED RULEMAKING**

**PUBLIC HEARING TO CONSIDER AMENDMENTS TO THE PROCEDURES FOR  
ADJUDICATORY HEARINGS AND ADMINISTRATIVE HEARINGS FOR  
CITATIONS ISSUED UNDER THE HEAVY-DUTY VEHICLE ROADSIDE SMOKE  
AND TAMPERING INSPECTION PROGRAM (ROADSIDE HEARING PROCEDURES)  
AND ADOPTION OF PETITIONS FOR REVIEW OF  
EXECUTIVE OFFICER DECISIONS**

State of California  
AIR RESOURCES BOARD

Staff Report: Initial Statement  
of Reasons for Proposed  
Rulemaking

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ADJUDICATORY HEARINGS AND ADMINISTRATIVE HEARINGS FOR CITATIONS  
ISSUED UNDER THE HEAVY-DUTY VEHICLE ROADSIDE SMOKE AND TAMPERING  
INSPECTION PROGRAM (ROADSIDE HEARING PROCEDURES) AND ADOPTION OF  
PROCEDURES FOR ADMINISTRATIVE HEARINGS FOR COMPLAINTS AND  
PETITIONS FOR REVIEW OF EXECUTIVE OFFICER DECISIONS

Date of Release: August 7, 1998  
Scheduled for Consideration: September 24, 1998  
Agenda Item No.:

I. INTRODUCTION

A. Background

In the late 1980's, early 1990's, the Air Resources Board (ARB or Board) adopted procedures for two distinct types of administrative hearings. In 1989, the ARB adopted regulations establishing a petition process and adjudicatory hearing procedures to review executive officer decisions, Title 17, California Code of Regulations (CCR), sections 60040 - 60053. Specifically, the procedures allow a party to petition the Board, itself, to review executive officer decisions in the following areas: (1) vehicle or engine recalls under Health and Safety Code section 43105; (2) intentions to revoke or suspend a license as a vehicle emission test laboratory pursuant to Title 13, CCR, section 2048; (3) other decisions where adjudicatory decisions are required by law, but neither the administrative adjudication procedures contained in Government Code section 11500, et seq., nor other hearing procedures are specified. These procedures were designed to be decided by the Board, itself, and were anticipated to typically involve policy questions, complicated factual and legal issues, and significant evidentiary records.

In 1991, the ARB adopted regulations establishing test procedures and protocols of enforcement and procedures for conducting administrative hearings for citations issued under the Roadside Inspection Program. The Legislature had specifically directed the ARB to, among other things, adopt regulations that (1) prohibit the use of heavy-duty vehicles with excessive smoke emissions or other emission-related defects; (2) authorize the issuance of citations assessing prescribed penalties to the owners or operators of heavy-duty vehicles that violate the regulations;

and (3) afford a cited owner an opportunity for an administrative hearing consistent with the provisions set forth in the legislation. (Senate Bill (SB) 1997 (Stats. 1988, ch. 1544); Assembly Bill (AB) 1107 (Stats. 1989, ch. 940), SB 1874 (Stats. 1990, ch. 1433), codified at Health and Safety Code section 44011.6.)

In adopting the Roadside Inspection Program, the Board established test procedures for identifying heavy-duty diesel vehicles with excessive smoke emissions and inspection procedures for identifying heavy-duty vehicles with tampered or defective emission controls, a penalty schedule for cited vehicles, requirements for demonstrating that the deficiencies have been corrected, and provisions for removing vehicles from service due to uncleared citations and for the subsequent release of such vehicles, Title 13, CCR, sections 2180, et seq. At a later hearing, the Board adopted regulations for administrative hearings. The Board specifically found that the existing adjudicatory hearing procedures, Title 17, CCR, sections 60040, et seq., were not appropriate for the anticipated high-volume of citations that would be issued under the Roadside Inspection Program. It subsequently adopted Title 17, CCR, sections 60075.1, et seq., a more streamlined administrative hearing process that would be capable of handling a large volume of cases while still providing owners of cited vehicles with notice and the opportunity to request an administrative hearing to contest the issued citation.

The Roadside Inspection Program became operative on November 21, 1991 and the program was enforced until October 15, 1993. During that time approximately 8,500 citations were issued; of that number, approximately 13.6 percent of the cited vehicle owners requested hearings. On October 15, 1993, the ARB temporarily suspended enforcement of the Roadside Inspection Program. In that same year, the Legislature enacted AB 584 (Stats. 1993, ch. 578) that, among other things, required that the test procedures used in the Roadside Inspection Program “produce consistent and repeatable results,” which could be satisfied by the adoption of the Society of Automotive Engineers (SAE) J1667 test procedure, and that the program produce “no false failures,” or ensure that any false failures be remedied without penalty to the vehicle owner. Regarding the administrative hearing procedures, AB 584 extended the time period for a cited vehicle owner to request a hearing from 30 to 45 days. The ARB postponed resumption of the Roadside Inspection Program until changes in accordance with the AB 584 mandates could be ready. The SAE J1667 test procedure has now been formally adopted by SAE, and the Board has approved amendments to the Roadside Inspection Program test procedures to implement SAE J1667. The proposed amendments to the administrative hearing procedures that are described herein, specifically addresses the requirement for additional time in which to file a request for hearing in compliance with AB584.

In 1995, the Legislature expanded the ARB’s authority to assess and enforce administrative penalties. (Senate Bill (SB) 163, Stats. 1995, Ch. 966, Sec. 3, codified at Health and Safety Code section 43025, et seq.) Section 43028 provides that the ARB may adopt rules and regulations to impose and enforce administrative civil penalties for violations of Part 5 of the

Health and Safety Code, or any rule regulation, permit, variance, or order of the state board, pertaining to fuel requirements and standards. Under legislative authorization, the ARB may assess administrative penalties up to a maximum of \$25,000 per day for each violation, up to a maximum total penalty of \$300,000. Section 43031(a) provides that the ARB may adopt administrative hearing procedures to review administrative penalties that have been assessed.

#### B. Summary of Proposal

The administrative civil penalties that can be assessed under Health and Safety Code sections 43028 cover a myriad of different types and forms of penalties, ranging from straightforward clear violations involving relatively small penalty amounts to violations involving complicated issues, large amounts of evidence, and significant penalties. Given the breadth of potentially different violations and the different interests involved in the litigating of such matters, the ARB staff recommends that violations covered under Health and Safety Code section 43028, be treated as either violations for which citations or more formal complaints could be issued. Under the authority provided in section 43031(a), the staff proposes two distinct hearing procedures for the review of citations and complaints.

The staff recommends that citations should be issued for the less serious, less complex, more readily discernable violations. These violations would be classified as Class I violations and would be subject to maximum penalties of \$5000 per violation per day. A citation could be issued for multiple violations up to a maximum of \$15,000. For the review of citations issued pursuant to section 43028, staff proposes that the hearing procedures that have previously been adopted to review citations issued under the Roadside Inspection Program be amended to cover citations issued under section 43028. The amended procedures, would be entitled, “Administrative Hearing Procedures for Considering Citations.” The amended procedures, which are attached as Attachment A, would be entitled, “Administrative Hearing Procedures for Review of Citations.” Beyond broadening the scope of the existing citation hearing procedures, the proposed amendments would incorporate provisions of the recently amended Administrative Procedures Act, Government Code section 11370 et seq. The proposal also includes amendments to clarify and make more specific the rights and responsibilities of the parties to the hearing, the hearing office and the officers who adjudicate and review the decisions and orders that are issued.

As mentioned, pursuant to the directives of Health and Safety Code sections 43028 and 43031(a), staff further recommends the adoption of hearing procedures for the review of complaints, the more serious and complex violations issued under part 5, chapter 1.5 of the Health and Safety Code. The new procedures would be codified at Article 4.5 of Title 17, CCR, sections 60065.1 et seq., and be entitled, “Administrative Hearing Procedures for Review of Complaints.” (See Appendix B.) The new hearing procedures would review complaints that allege penalties of up to \$25,000 per day for each violation, up to a maximum of \$300,000.

In contrast to the amended hearing procedures for administrative review of citations, the proposed procedures for the review of complaints are somewhat more comprehensive. Given the greater public and private interests at stake in complaint proceedings, the hearing procedures would entail a more detailed prehearing process, including the potential for broader discovery, than is provided for in the review of citations. Again, the proposed procedures would incorporate provisions from the amended APA. The more comprehensive proceedings would enable the parties to better identify issues in controversy, prepare for hearing, and resolve issues short of hearing. It is anticipated that the proposed prehearing procedures would provide for a more effective and efficient hearing process while continuing to provide the parties with a fair and impartial process.

Staff also proposes that the Board adopt new hearing procedures for considering petitions for review of executive officer decisions. These petitions are presently considered under the existing procedures for adjudicatory hearings, Title 17, CCR, sections 60040-60053. The new procedures would be codified at Article 4.25 of Title 17, CCR, sections 60065.1 et seq., and be entitled, “Administrative Hearing Procedures to Consider Petitions for Review of Executive Officer Decisions.” (See Appendix C.) Staff is proposing the new procedures because recent experience in administering the existing adjudicatory regulations has made it clear that more detailed and express hearing procedures would improve the hearing process for all parties. With certain specific exceptions, the proposed procedures for the review of petitions would be similar to that being proposed for the review of complaints. For the most part, the subject matter of petitions for review is of similar complexity to that covered in complaints. As with the hearing procedures for complaints, the proposed procedures would afford the parties with appropriate due process and be cost-effective.

Finally, the staff proposes that Title 17, CCR, sections 60040-60053 be amended to clarify that all executive officer decisions issued prior to the effective date of the new hearing procedures be heard under the existing adjudicatory hearing procedures, unless the parties agree otherwise. (See Appendix D.)

## II. DISCUSSION

### A. Violations Arising Under Section 43028:

The primary issue considered by the staff in proposing amendments to the existing ARB administrative hearing procedures is the question of the appropriateness of the present procedures for handling violations arising under section 43028 of the Health and Safety Code. As previously stated, in that section, the Legislature entrusted the ARB to adopt rules and regulations to impose and enforce administrative civil penalties for violations of Part 5 of the Health and Safety Code, or any rule, regulation, permit, variance, or order of the state board, pertaining to fuel requirements and standards. Under legislative authorization, the ARB may assess administrative penalties up to

a maximum of \$25,000 per day for each violation and a total penalty up to \$300,000. As stated above, subsumed within this broad charge is a myriad of different types and forms of violations and penalties that could be assessed.

Violations that may be alleged under section 43028 range from those that are relatively straightforward and clear-cut, over which no factual dispute exists, and involve small potential penalties, to violations involving complex factual and legal issues, significant amounts of technical, documentary and other forms of evidence, which often involve disputed discovery issues, and potentially large penalties. Additionally, violations covered under section 43028 involve noticeably different interests for both the alleged violator (the varying property interests at risk, as represented by potential penalties) and the ARB (cost to the agency's resources for compliance and enforcement). These varying interests must be weighed and balanced on a case-by-case bases under existing law.<sup>1</sup> To address these varying interests and the diversity of violations, in general, the ARB staff recommends that violations arising under Health and Safety Code section 43028 should be classified as violations for which either citations or more formal complaints could be issued. Accordingly, staff proposes that the hearing procedures set forth factors that the ARB should consider in making its determinations as to whether a citation or a complaint be issued. How a violation is classified would determine the applicable administrative hearing procedure to determine the merits of a contested action.

Under this proposal, the administrative hearing procedures for review of citations issued under the Roadside Inspection Program would be amended to cover citations issued under section 43028, as well as the Roadside Inspection Program. It is proposed that violations for which citations are issued be defined in the procedures as Class I violations. All violations under the Roadside Inspection Program would be considered Class I violations. In addition, under the proposal, the ARB would determine, upon review of specific factors considered as a whole, that certain violations of the ARB fuel requirements and standards are Class I violations. As stated, these would be the types of violations that the ARB determines to be relatively clear-cut and straightforward, less complex, and less serious in nature. The ARB's determination would be made on a case-by-case basis considering such factors as whether the violation(s) is readily detectable, the risk and degree of environmental harm or injury to the public health and safety resulting from the violation(s); the time, effort, and expense required to correct the violation(s); the frequency and duration of the violation; the importance of the violated requirement to the regulatory program; the cooperation of the respondent in detecting and correcting the violation(s); and compliance history of the respondent. For example, a determination that a violation is a Class I violation would likely be made if a violation could be readily discerned; posed little risk of environmental harm; had not been identified in a previous enforcement action against the violator; had occurred only once or for a short period of time; or required little time, effort, or expense to remedy. Recognizing that the listed factors may not be exhaustive, the regulation would allow the ARB to consider other factors as appropriate.

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<sup>1</sup> See Mathews v. Eldridge, (1976) 424 U.S. 319, discussed infra.

The proposed regulation and the determination of Class I violations is not intended to limit the ARB's authority to fully exercise its enforcement discretion on how to characterize and enforce violations. Accordingly, the Class I determination could not be raised as an affirmative defense in an administrative hearing.

It is proposed that such violations be assessed a maximum penalty of \$5,000 per violation, with a total penalty amount for any one citation to be no more than \$15,000. The penalty amounts are designed to be significant enough to deter violations and to ensure a high rate of compliance. On the other hand, the penalties assessed would, in general, be significantly lower than the amounts that could be assessed under the administrative complaint process or for violations that are judicially enforced.

In contrast, staff proposes that all violations arising under section 43028 of the Health and Safety Code that are not classified as Class I violations be subject to the proposed adjudicatory hearing procedures, Title 17, CCR, sections 60040.1, et seq. These violations would be subject to the issuance of complaints and would typically involve the more serious, complex compliance problems, involving, in general, significantly higher penalty assessments. These violations would be subject to penalties of up to \$25,000 per day for each violation, up to a maximum total penalty of \$300,000.

B. Proposed Amendments to the Administrative Hearing Procedures for Review of Citations:

As initially adopted, the administrative hearing procedures for review of citations issued under the Roadside Inspection Program were intended to be a streamlined hearing process that afforded all parties a fair and expeditious hearing. In keeping with these goals, the proposed amendments seek to better define and outline the respective rights and responsibilities of the hearing office, the parties, and the decision makers. A summary of the amendments follows.

Subarticle 1. General Provisions

§ 60075.1. Applicability: As explained above, the applicability of the procedures were broadened to include citations issued under section 43028 of the Health and Safety Code.

§ 60075.2. Definitions: A number of new terms were defined to provide specificity and clarity. The newly defined terms include:

(b)(1) "Administrative Record" refers to all documents and records that have been timely filed with the hearing office during the course of the hearing procedures, excluding any prohibited communications as defined in section 60055.13.

(b)(2) “Citation” refers to the administrative actions that can be issued pursuant to the Roadside Inspection Program and section 43028 of the Health and Safety Code.

(b)(3) “Class I violation” refers to the more straight forward, less complex and serious types of violations for which citations would be issued.

(b)(4) “Complainant” refers to the ARB, acting through its employees, as the party that has issued a citation for violations of the Roadside Inspection Program or section 43028 of the Health and Safety Code.

(b)(5) “Consent order” is a formal order issued by the hearing officer approving a settlement between the parties that resolves the underlying citation for which a hearing has been requested.

(b)(7) “Discovery” is specifically and narrowly defined to include the limited exchanging of documents by the parties and taking of depositions as provided in proposed section 60075.26.

(b)(11) “Penalty” refers to the monetary amount that can be assessed against a respondent for a citation.

(b)(12) “Proceeding” refers to all matters that occur before a hearing officer during the administrative review of the citation.

(b)(13) “Respondent” refers to the party who has received a citation and has requested an administrative hearing to consider the merits of the citation.

(b)(14) “Settlement Agreement” refers to the agreement between the parties that resolves the underlying citation.

The staff also proposes to amend the following subparagraphs:

(b)(8) “Hearing Office” to reference amended section 44011.6 and section 43028 of the Health and Safety Code.

(b)(9) “Hearing Officer” to clarify that hearing officers shall only be administrative law judges appointed by the Board.

(b)(10) “Party” has been amended to clarify that parties to a citation hearing include the complainant and respondent.

Finally, staff is proposing that the definitions of “staff of the state board” and “state board” be deleted in that the former term is subsumed within the definition of complainant and the later term is defined elsewhere in the Health and Safety Code.

§ 60075.3. Time Limits; Computation of Time: Subparagraph (b) would be amended to eliminate confusion in determining the last date for filing papers or performing required duties. It is proposed that subparagraph (e) be amended to provide additional time to exercise or perform a right or act if created by a document or other writing that has been served by overnight delivery or facsimile transmission.

§ 60075.4. Service, Notice and Posting: The proposed amendments reflect that service may be completed by overnight delivery and facsimile transmission as well as by personal delivery and first-class mail.

§ 60075.5. Form of Pleadings: Nonsubstantive amendments have been proposed for purposes of clarity.

§ 60075.6. Limitations on Written Legal Arguments or Statements: This proposed new section provides the parties with notice of specific requirements regarding size of type and number of pages of pleadings that can be submitted to the hearing office during the proceedings.

§60075.7. Records of the State Board: No substantive changes have been proposed.

§ 60075.8. Representation: The right to representation was previously set forth in section 60075.33. A party would continue to have the right to be represented by him or herself or by a representative of his or her choosing. Representation would be at a party’s own expense, and there would be no right to appointed counsel because of indigency. A representative need not be an attorney. The rights and requirements of this section are consistent with the State’s Constitution and the State Administrative Procedure Act.

§ 60075.9. Interpreters and Other Forms of Accommodation: Present section 60075.31, which provides that parties to administrative hearings have the right of access to an interpreter, would be moved to this section. It is proposed that the provision be amended to specifically refer to the amended APA and to clarify the specific responsibilities of both the hearing office and the parties.

§ 60075.10. Motions: Staff proposes to delete existing section 60075.18 and replace it with this section that would set forth more detailed provisions for filing and hearing of motions. The proposed procedures closely parallel regulations that have been adopted by the Office of Administrative Hearings.

## Subarticle 2. Issuance and Service of Citations

§ 60075.11. Determination of Class I Violations: This proposed new section defines violations for which citations may be issued and sets forth the criteria that would be considered by the ARB in determining a violation's classification. A Class I violation would include all citations issued under the Roadside Inspection Program and those violations that are considered to be the more clear-cut, less complex and less serious types of violations under section 43028 of the Health and Safety Code. In making the above determination, the ARB would consider, but not be limited to, the following factors: (1) the ability to readily discern the violation; (2) the potential risk of injury to the public or environmental harm from the violation; (3) whether the violation is a single violation or has occurred in tandem with other violations; (4) the frequency and duration of the violation; (5) the time, effort, and expense required to correct the violation; (6) the cooperation of the respondent in detecting and correcting the violation; and (7) the compliance history of the respondent. The maximum penalty that could be assessed for a Class I violation would be \$5,000 per day, per violation, with a maximum penalty for a citation being \$15,000 .

§ 60075.12. Issuance and Service of Citations: This proposed section sets forth the procedures the ARB would follow in issuing and serving citations. Subparagraph (b) identifies the information that the ARB would be required to include in the citations to provide full and fair notice to the cited party. Among other things, the citation would be required to set forth sufficient facts of the alleged violation and provide adequate notice of the party's right to request a hearing, the consequences for failing to do so, the right to representation, and, if necessary, the right to an interpreter for the purpose of language assistance.

## Subarticle 3. Hearing Officers

§ 60075.13. Authority of Hearing Officers; Disqualification: Existing section 60075.7, has been amended to provide additional clarity of the duties and responsibilities of the hearing officer, which include authority to conduct prehearing and settlement conferences. It is proposed that subparagraph (b), which sets forth provisions for disqualification of the hearing officer, be amended to include the right to request the disqualification of the executive officer from hearing a request for reconsideration of a hearing officer decision.

## Subarticle 4. Ex Parte Communications

§ 60075.14. Prohibited Communications: It is proposed that Subarticle 4, sections 60075.14-60075.16, replace existing section 60075.9. The staff is proposing detailed amendments to the ex parte provisions believing that it is important to clearly set forth the prohibitions and the obligations and responsibilities of the individual parties, the hearing officer, and the executive officer regarding off-the-record communications during the course of the

proceedings. Section 60075.14, identifies the types of communications that one party cannot share with the hearing officer, without notice and opportunity being provided to the other party to hear and respond to the communication.

Proposed subparagraph (e) would permit limited communications between the hearing officer and an employee of the Board, if the employee has not served as an investigator, prosecutor, or advocate in the proceeding or its preadjudicative stage, and the purpose of the communication is to assist and advise the hearing officer in determining motions regarding claims of confidential business information (i.e., trade secrets), reviewing the evidence in the record, and drafting decisions or orders. In carrying out these functions, the employee of the state board would not be allowed to furnish, augment, diminish, or modify the evidence in the record. Specifically, communications that went to the weight or credibility of the evidence would not be permitted. This exception would also permit limited communications between employees of the Board and the executive officer when the executive officer reconsiders decisions issued by the hearing officer. See section 60075.16, infra. The availability of assistance through consultation should result in more accurate decision making. This exception is consistent with the APA.

§ 60075.15. Disclosure of Communication: This proposed section sets forth the procedures that the hearing officer would be required to follow if he or she receives a prohibited communication either prior to or during the course of the proceedings. The proposal also makes it clear that receipt of ex parte communications may be a cause for disqualification of the hearing officer.

§ 60075.16. Applicability to Executive Officer: It is proposed that the provisions governing ex parte communications be applicable to the executive officer who is authorized to hear requests for reconsideration of the hearing officer decisions. This provision parallels the provisions of the State APA.

#### Subarticle 5. Initiating Proceeding to Contest a Citation

§ 60075.17. Filing a Request for Hearing: In subparagraph (a), staff proposes to amend former section 60075.10 to make the section applicable to citations issued under section 43028 of the Health and Safety Code and to clarify that person's receiving citations have the option to pay the penalty in full in lieu of filing a request for hearing. Staff further proposes that subparagraph (a)(1) be amended to clarify that the requests for hearings be in writing.

In subparagraph (b), staff proposes that the procedures be amended to conform with amendments to Health and Safety Code section 44011.6(m) which extend the time for filing a request for hearing from 30 to 45 days.

Staff proposes to add subparagraph (c) establishing a 30 day filing deadline for requesting a hearing for citations issued under Health and Safety Code section 43028. The 30 day period would encourage expeditious handling of these violations. Despite the express 45-day time provided in Health and Safety Code section 44011.6(m) to file requests for hearings for citations issued under the Roadside Inspection Programs, the 30-day period for filing in cases arising under Health and Safety Code section 43028 is reasonable when compared to many other administrative enforcement procedures. (e.g., APA, section 11506, “Within 15 days after service of the accusation, respondent may file . . . a notice of defense;” Water Code section 13320(a), “Within 30 days of any action or failure to act by a regional board . . . any aggrieved person may petition the board to review that action or failure to act.”)

Subparagraph (d) would provide that the hearing officer may extend the applicable filings periods for good cause. The existing procedures provide that if a party does not request a hearing to contest a citation issued under the Roadside Inspection Program within the filing period, the citation would become a final order of the state board that is not reviewable. Subparagraph (e) proposes to extend that provision to citations issued under Health and Safety Code section 43028.

It is proposed that former subparagraph (c) be amended to clarify that the cited party’s written notice requesting hearing shall be deemed filed on the date that it is received by the hearing office. As previously drafted, the procedures were confusing in that they could be interpreted to permit oral communications and different filing dates depending on the medium used for service and filing.

Staff proposes the addition of subparagraph (h) to provide notice that the respondent may only amend a request for hearing for good cause and at the discretion of the hearing officer.

§ 60075.18. Form of Request for Hearing: Staff proposes that former section 60075.11 be amended to require that requests for hearing include the following information in addition to that which is already required: the name and address of a designated representative, if any. In addition, it is proposed that the request for hearing be signed by either the respondent or the designated representative.

§ 60075.19. Issues for Hearing: No substantive changes are proposed to existing section 60075.12.

§ 60075.20. Effect of Filing a Request for Hearing. Staff proposes to modify existing section 60075.13 to reflect the broader applicability of the citation hearing procedures to citations issued under Health and Safety Code section 43028. Consistent with the existing procedures, a timely request for hearing would automatically stay respondent’s obligation to correct deficiencies issued under the Roadside Inspection Program until a final decision is issued. For all other citations, if a cease and desist order has been issued, the hearing officer would evaluate the nature

of the violation on a case-by-case basis and shall issue a stay pending a final decision, unless the hearing officer finds that the adverse effects of a stay on the public health, safety and welfare outweigh the harm to those persons directly affected by the lack of a stay.

§ 60075.21. Response: No substantive changes to former section 60075.14 have been proposed.

#### Subarticle 6. Resolution of Proceeding Without Hearing

§ 60075.22. Withdrawal of Request for Hearing: To avoid confusion because of ambiguity, the reference in former section 60075.15 that an order granting a withdrawal of a request for hearing is not subject to review by any court or agency 30 days after service on the parties has been made has been deleted. As presently written, the 30 days specifically reflected the time period formerly set forth in Health and Safety Code section 44011.6 for requesting a hearing under the Roadside Inspection Program. This time period is no longer appropriate. In 1994, the Legislature extended this filing period to 45 days by statutory amendment. Health and Safety Code section 44011.6(m). Rather than simply amending the procedures to reflect the 45-day filing period, which is not applicable to citations issued under Health and Safety Code section 43028, staff believes that it would be clearer to amend the procedures to set forth the exact process that occurs when a withdrawal order is granted. The order effectively reinstates the citation, placing the cited party in the same position that it would have been in had it not requested a hearing in the first place. Accordingly, once the time period for filing the request has passed the citation should be deemed a final order and not subject to judicial review.

§ 60075.23. Withdrawal of Citation: No substantive changes have been proposed to former section 60075.16.

§ 60075.24. Settlement Agreements and Consent Orders: This section is proposed to establish formal procedures to encourage the parties to settle the matters at issue short of litigation. To this end, the hearing office would make a hearing officer available to assist the parties. The hearing officer would not be the same hearing officer that has been assigned to hear the case, unless the parties expressly consent to provide otherwise. In the case where the parties could not reach settlement, all discussions regarding settlement would be privileged and not be made part of the record in the hearing on the merits.

§ 60075.25. Motions for Summary Determination of Issues: It is proposed that this section be added to replace former section 60075.17, Disposition of Issues. This section would establish a process to allow the parties to file motions for summary judgment and summary adjudication of issues for which there is no dispute regarding material facts. Without sacrificing a party's right to a hearing to present evidence, this process would allow for more expeditious disposition of issues and cases, saving the time and resources of the parties and the hearing office.

Upon receipt of such motions and opposing papers, the hearing officer would determine whether there are any issues involving disputed facts. If there are none, the hearing officer would review legal arguments of the parties and decide the merit of those issues. In those cases where a party opposing a motion for summary determination can establish that it is unable to obtain information that would indicate that disputed facts exist, the hearing officer may deny the motion or may order a continuance to permit affidavits to be obtained or may permit the party to undertake additional discovery consistent with the discovery provisions provided in these regulations.

#### Subarticle 7. Discovery, and Subpoenas and Subpoenas Duces Tecum

§ 60075.26. Discovery: This proposed section would replace former section 60075.20, Access to Documents. The new section would clarify and limit the types of documents that a party would be entitled to in a hearing to review the merits of a citation. In general, the parties would be allowed access to all documents that the opposing party intends to introduce at the hearing. In addition, the complainant would be entitled to financial documents from the respondent if the respondent has raised issues regarding its financial inability to pay a penalty or that it has not incurred economic benefit from the alleged violations in its response. The complainant would be entitled to such documents because such evidence would be at issue in the hearing and respondent may not intend to fully introduce all relevant evidence into the record. Such evidence typically lies in the possession of the respondent. As under the existing procedures, the right to take depositions would be limited to material witnesses who are either unable to attend or cannot be compelled to attend the hearing on the merits.

As proposed, the hearing officer, upon motion, would have authority to issue protective orders to protect the confidentiality of documents identified as trade secrets or otherwise confidential. The motion for protective order could be filed by the parties to the proceeding, persons who claim the information to be confidential, or the hearing officer. In fashioning a protective order, the hearing officer would balance the needs for confidentiality of the person or party making the claim against the needs of the party desiring the information to properly prepare and present its case. Authority to grant protective orders is necessary to assure that the two conflicting interests are adequately protected and that a full and fair hearing is provided to all parties.

§ 60075.27. Proceeding to Compel Discovery: It is proposed that existing section 60075.25 be amended to reflect recent amendments to Government Code section 11507.7 of the APA which provides that the hearing officer has authority to compel discovery. This should help expedite hearings.

§ 60075.28. Subpoena and Subpoena Duces Tecum: This section would replace existing sections 60075.8 and 60075.21, 60075.24, and 60075.36, all of which pertain to the issuance and

enforcement of subpoenas and subpoenas duces tecum. The new section conforms with the recent amendments to the APA, Government Code sections 11450.05 through 11450.50. Specifically, the new section sets forth the process for issuing and opposing subpoenas to compel third-party witness attendance at hearings and the production of documents. It further would set forth the procedures for enforcement of subpoenas in state court against witnesses who refuse to comply with an issued subpoena. Finally, the section would provide that subpoenaed witnesses are entitled to the same mileage and appearance fees as witnesses in state court actions, and that such payment should be paid by the party who has requested issuance of the subpoena.

#### Subarticle 8. Contempt and Sanction Orders

§ 60075.29. Contempt: This proposed section would provide the hearing officer with greater enforcement authority to ensure the credibility and viability of the hearing process and the underlying programs. The new section is intended to reflect the recently amended APA, Government Code sections 11455.10, et seq., as well as the previously existing statutes for enforcement that are set forth in Government Code sections 11186 through 11188. These provisions would allow the hearing officer to proceed to state court for contempt proceedings against a party guilty of misconduct. It is further proposed that the hearing officers be given authority to assess reasonable expenses, including authorized representative fees, against a party, its representative, or both, whose bad faith actions or frivolous tactics have caused an opposing party to incur specific and identifiable unnecessary expenses. The ability to obtain sanctions against disobedient, disorderly, and disruptive participants in the hearing process should enable the hearing officer to maintain the integrity and decorum of the process, which should provide for more expeditious, efficient and fair hearings. This section would replace existing sections 60075.24 and 60075.36 of the procedures.

#### Subarticle 9. Hearings

§ 60075.30. Time and Place of Hearing: To promote clarity and eliminate duplication, staff proposes that existing sections 60075.26, Time and Place of Hearing, and 60075.32, Continuance of Hearing, be combined in this section, which covers scheduling of hearings.

§ 60075.31. Consolidation and Separation of Cases: The existing procedures provide the hearing officer with discretion to consolidate cases to better utilize resources, to simplify issues, or to avoid prejudice. It is proposed that the hearing officer be provided with the same authority to conduct separate hearings when necessary based on similar rationale.

§ 60075.32. Failure to Appear: No substantive changes to existing section 60075.28 have been proposed.

§ 60075.33. Conduct of Hearing: The staff is proposing that existing section 60075.29 be amended to clarify, through greater specificity, the respective rights and responsibilities of the parties and the authority and duties of the hearing officer in conducting administrative hearings.

§ 60075.34. Evidence: It is proposed that existing section 60075.30 be amended to underscore the hearing officer's authority to exclude evidence that is unduly prejudicial. This authority is fundamental to guaranteeing a fair hearing, and is a long-standing evidentiary rule. A minor amendment has been proposed to the hearsay rule to make it consistent with recent amendments to the APA.

§ 60075.35. Evidence by Affidavit or Declaration: It is proposed that this section be modified to more closely parallel Government Code section 11514 of the APA. Under the proposed language, the hearing officer would have discretion to allow an affidavit or declaration to be introduced into evidence even though the opposing party has not been provided an opportunity to cross-examine the witness. However, if allowed into evidence the affidavit or declaration would be given the same effect as other hearsay evidence. By providing the hearing officer with discretion, he or she can appropriately determine, after reviewing all of the circumstances, whether it is in the interest of justice to allow the evidence to be introduced.

§ 60075.36. Exclusion of Witnesses: It is proposed that nonsubstantive amendments be made to existing section 60075.34 for purposes of clarity.

§ 60075.37. Oral Argument and Briefs: It is proposed that nonsubstantive amendments be made to existing section 60075.35 for purposes of clarity.

#### Subarticle 10. Decisions After Hearing

§ 60075.38. Default Order: Staff proposes limited amendments to existing section 60075.37 to require the complainant to make an offer of proof showing the appropriateness of the penalty amount. This amendment is consistent with judicial and administrative practice.

§ 60075.39. Penalty Assessment Criteria: The staff proposes that this new section be added to specifically set forth the criteria that the hearing officer should consider in assessing penalty orders. For Roadside Inspection Program citations, the penalty amounts are specifically set forth in Health and Safety Code section 44011.6 and in Title 13, CCR, sections 2180, et seq. For violations of Health and Safety Code section 43028, the proposed section restates the specific criteria set forth by the Legislature in section 43031 of the Health and Safety Code. The factors that the hearing officer would be required to consider include: the extent of harm caused by the violation to public health and safety and to the environment; the nature and persistence of the

violation; the compliance history of the respondent; the preventive efforts taken by the respondent; the innovative nature and the magnitude of the effort required to comply; the efforts to attain, or provide for compliance; and the cooperation of the respondent.

§ 60075.40. Order or Decision After Hearing: It is proposed that existing section 60075.38 be amended to add that the hearing officer should be responsible for certifying the administrative record and providing a copy to the executive officer for review. This would conform the regulations to the existing practice of the hearing office. Additionally, for purposes of clarity former, existing section 60075.39, Rehearing by Hearing Officer, has been incorporated into this proposed section. The intent of existing section 60075.39 is to allow the hearing officer to correct mistakes or errors in his or her decision either upon request by a party or on his or her own motion. This opportunity would still be available in proposed subparagraph 60075.40(e); however, the reference to rehearing would be deleted to avoid confusion.

#### Subarticle 11. Reconsideration by the Executive Officer

§ 60075.41. Reconsideration; On Motion of Executive Officer or by Request of Party: To provide clarity, staff is proposing minor, nonsubstantive changes to existing section 60075.41.

§ 60075.42. Reconsideration; Procedural Requirements: For purposes of clarity, staff proposes that all of the procedural requirements regarding requests for reconsideration be consolidated within this one section. Therefore, staff recommends to incorporate subparagraphs 60075.41(c)-(e) and 60075.43(a) and (b) of the existing procedures into section 60075.44, Reconsideration; Orders and Decisions by the Executive Officer. The substance of these subparagraphs have largely been kept intact, with several minor exceptions. Staff proposes that subparagraph 60075.42(a) include language that provides that requests for reconsideration are limited to the review of only those issues that were raised before the hearing officer. Additionally, staff proposes the addition of a sixth ground for reconsideration -- that is, reconsideration may be granted if an order or decision is contrary to applicable law. These amendments would be consistent with administrative jurisprudence and help ensure that all parties fully understand their rights and responsibilities under the reconsideration provisions of the procedures. Other nonsubstantive amendments are proposed for grammatical and format purposes.

§ 60075.43. Reconsideration; Orders and Decisions by the Executive Officer: The staff proposes that the procedures be reorganized to provide a section that consolidates existing provisions that pertain to the executive officer's authority in granting reconsideration. The revised organizational structure should provide greater clarity to the parties involved in the administrative hearing process.

Proposed subparagraph (a) would incorporate, with minor changes, existing section 60075.40, subparagraph (b), which provides for summary denials of requests for reconsideration if the executive officer fails to affirmatively act upon the request for reconsideration within 20 days of filing.

Subparagraph (b) of proposed section 60075.43, incorporates, again with minor changes, existing sections 60075.41(f), 60075.42, and 60075.44-60075.45, which, among other things, provide that the executive officer may grant stays of the hearing officer order or decision, affirm, rescind, or amend the order or decision of the hearing officer, and direct the taking of additional evidence.

Proposed subparagraph (c) requires that any decision of the executive officer on reconsideration be in writing, and any modifications to the hearing officer decision or order must be supported by findings of fact and conclusions of law.

#### Subarticle 12. Final Orders and Decisions

§60075.44. Final Order or Decision; Effective Date: The amendments propose to clarify when a order or decision becomes final and its effective date.

#### Subarticle 13. Judicial Review

§60075.45. Judicial Review: Staff has proposed that existing section 60075.47 be amended to make clear that a party does not have the right to judicial review if it fails, in the first instance, to request a hearing to contest the issuance of a citation. Staff also proposes to add a section that allows a respondent, in a matter involving a citation issued under section 43028 of the Health and Safety Code, 30 days to seek judicial review. Although respondents contesting citations issued under the Roadside Inspection Program are provided by statute 60 days to file a request for judicial review, 30 days is the time period often provided in other administrative procedures. See for example, Government Code section 11523.

#### C. Proposed Adoption of Administrative Hearing Procedures for Review of Complaints and Petitions for Review of Executive Officer Decisions:

As initially adopted in 1989, the Adjudicatory Hearing Procedures, Title 17, CCR, sections 60040-60053 provided only for the review of certain executive officer decisions. At the time of adoption, it was anticipated that the decisions under review would, in general, involve the deprivation of significant property interests of the party petitioning for a hearing (e.g., orders directing manufacturers to recall and repair noncomplying motor vehicles; orders to revoke or suspend licenses of vehicle emission test laboratories). The adjudicatory hearing procedures were intended to provide appropriate due process to the stakeholder, guaranteeing the adversely

affected party with notice of the executive officer's decision and an opportunity to contest the findings underlying the decision in a fair and impartial hearing. In implementing the existing procedures, however, staff has discovered that the procedures lack sufficient specificity and articulation of process in certain areas, especially in regard to prehearing requirements and procedures. This has raised certain questions regarding the process and has resulted in some unnecessary delay in the scheduling and conducting of hearings. Accordingly, staff recommends that the Board adopt new hearing procedures for petitions requesting review of executive officer decisions. Specifically, staff proposes procedures that more clearly delineate the rights and responsibilities of the parties, the hearing office, and the reviewing authorities. Specifically, the proposed procedures focus on prehearing procedures, which staff believes will allow the parties to better prepare for hearings. Concomitantly, staff believes that more fully prepared parties are in a better position to fully evaluate their cases and are more likely to resolve matters before hearing. This would result in a more cost-effective and efficient hearing process.

Like petitions for review, complaints often involve complex legal and evidentiary questions. Staff thus believes that respondents in complaint proceedings require similar due process protections to those provided to petitioners in review of executive officer decisions. However, recognizing that the petition and complaint administrative processes are distinct in several important areas -- e.g., different filing requirements; different processes for issuing and reconsidering decisions, etc. -- staff is recommending that separate hearing procedures be adopted for complaint and petition for review hearings. Staff believes that separate procedures would more clearly explain the procedures for a specific type of hearing and thus more useful and beneficial to the practicing parties, especially those parties appearing without legal counsel or representation.

Although separate procedures are being proposed, the general format of the two procedures are similar in many respects. Thus, for purposes of this discussion, the two procedures will be discussed together in the following sections, with differences duly noted.

### 1. General Provisions

As stated, the proposed hearing procedures would, in general, respectively cover complaints arising under section 43028 of the Health and Safety Code and petitions for review of executive officer decisions. The complaint hearing procedures would expressly not review citations that are subject to review under Article 5, section 60075.1, et seq.

In contrast to the existing adjudicatory hearing procedures, the petition for review hearing procedures would be broadened to expressly cover executive officer decisions that deny, revoke, or suspend executive orders certifying motor vehicle engine families under Chapter 2, Part 5, Division 26 of the Health and Safety Code. The proposed petitions for review procedures would retain language from the present adjudicatory procedures that make it clear that the

procedures do not apply to decisions of the executive officer that are related to the programs or actions of air pollution control or air quality management districts. Similarly, the proposed procedures would not apply to final orders and decisions issued by the executive officer under his or her authority to reconsider decisions in the administrative hearing for the review of complaints or citations.

Finally, both of the proposed procedures would respectively apply only to complaints filed and executive officer decisions issued after the effective date for the proposed procedures. Petitions filed before that day would continue to be heard under the existing adjudicatory hearing procedures, Title 17, CCR, sections 60040, et seq. Complaints will not be issued prior to the effective date of the proposed procedures.

To add specificity and clarity, the proposed procedures would define a number of new terms not included in the existing adjudicatory hearing procedures. The newly defined terms include: administrative record, complainant, complaint, consent order, default, discovery, ex parte communication, party, petition, petitioner, proceeding, respondent, response, and settlement agreement. The proposed procedures would specifically delineate how time limits are to be computed and provide that the hearing officer has discretion to provide additional time for filings and the rescheduling of hearings if necessary and good cause exists.

All parties would be allowed to represent themselves or be represented by counsel or other representative of their choosing. The proposed procedures would allow the parties to file all necessary pleadings and motions relating to the proceedings before the hearing officer. Although the procedures would not establish specific format or content requirements for the filing of motions, the parties would be required to set forth clear and plain statements of all relief sought. Additionally, all pleadings and motions filed would be required to be signed by the party or its representative, affirming that the contents of the documents are true and not submitted for the purpose of delay. The parties would be able to submit argument in support of and in opposition to all filed motions. The regulations would establish maximum page limits for filings (e.g., 15 pages for arguments in support of or opposition to motions; 5 pages for reply arguments). The original of all documents would be required to be filed with the hearing office with copies served on the other parties to the proceedings. As under the citation hearing procedures, service may be made by personal delivery, first-class mail, overnight delivery, or facsimile transmission.

The proposed procedures expressly provide that parties may request the assistance of interpreters and other reasonable accommodation. This parallels similar provisions that are included in the recently amended APA and provides guidance to the hearing office and the parties of their respective rights and responsibilities.

## 2. Authority and Disqualification of Hearing Officers

Existing section 60046 of Title 17, CCR, provides that hearings “may be held by the state board, by a committee of no fewer than two members of the state board, or by an administrative law judge from the Office of Administrative Hearings.” Under the new procedures, staff is proposing that initial proceedings be conducted before hearing officers from the administrative hearing office of the state board; however, if staffing and other resources of the administrative hearing office prevent reasonably expeditious assignment of hearing officers, the administrative hearing office shall refer the matters for assignment to the Office of Administrative Hearings (OAH). For the first two years after the effective date of the hearing procedures, the administrative hearing office of the ARB shall refer all petitions for review related to motor vehicle matters to OAH. Staff is proposing such referrals because, during this time, the state board’s administrative hearing office will be hearing cases for the first time since the ARB voluntarily suspended enforcement of the Roadside Inspection Program in October 1993. With the enactment of SB 163 and the proposed hearing procedures, the jurisdiction of the administrative hearing office of the ARB has been broadened to include cases regarding violations of the state’s fuel requirements and standards as well as all petitions for review. During the first years of hearings, while the hearing office endeavors to determine caseload and proper staffing levels for matters that involve both high-volume citations and potentially detailed, complex and lengthy litigation, it is presumed that resources of the state board hearing office will be strained. To relieve this strain, during this time, the staff believes that it would be best to refer the motor vehicle petition matters to OAH, because these cases are the most difficult to plan for and schedule in that they involve both lengthy, complex hearings and expedited proceedings that must be heard immediately.

All hearing officers, whether from the ARB’s administrative hearing office or OAH, would be full-time administrative law judges (ALJs) who would be entrusted with broad authority to take all actions necessary for the full and fair adjudication of all issues raised by a request for hearing. The hearing officer would be required to exercise this authority consistent with the specific provisions of the rules. Broad authority is necessary to enable the hearing officers to handle all contingencies that may arise during the course of an administrative proceeding.

In both hearings to review the merits of complaints and petitions for review of executive officer decisions, the hearing officer would conduct all prehearing conferences, hearings on motions and procedural issues, and hearings on the underlying merits; administer oaths; issue subpoenas; make all rulings and orders regarding motions and the introduction of evidence; call and examine witnesses; and make all necessary findings of fact based upon the evidence that has been introduced. At the conclusion of a complaint hearing, the hearing officer would issue a decision or order ruling on the merits of the allegations raised in the complaint. The decision or order would become final unless the executive officer elects to reconsider the matter upon receipt

of a request of a party or on his or her own motion. In petition for review hearings, the hearing officer would issue a proposed decision or order on the merits, which the Board itself would review and ultimately decide.

The staff believes that having hearings initially held before hearing officers would provide the most efficient and effective process. The hearing officers from the state board are experienced attorneys with specific expertise in air quality law and the administrative hearing process. The regulations would require that the hearing officers be independent, impartial, and fair. To this end, the hearing officers would not be allowed to have served, or be subject to the authority, direction, or discretion of a person who has served, as an investigator, prosecutor, or advocate in the proceeding or its preadjudicative stage. Such a potential conflict is avoided at the ARB in that the hearing office is independent of the executive office, the Office of Legal Affairs, and the divisions that investigate, prosecute, and advocate the decisions that are ultimately subject to review under these regulations. The ALJ classification is part of the state civil service. The salaries and benefits for the classification are established through collective bargaining with the employees' labor association. Pursuant to civil service rules, discipline of an ALJ must be supported by just cause, the final arbiter being the State Personnel Board. Impartiality of hearing officers is further assured by provisions in the regulations that specifically prohibit ex parte communications, including contacts with other employees of the agency, without providing notice of and information about such contacts with all parties to the proceeding. Improper ex parte contacts would be a possible grounds for disqualification of the hearing officer. See proposed sections 60055.13-60055.15 and 60065.13-60065.15.

A hearing officer would be required to disqualify him or herself from any case in which he or she could not accord a fair or impartial hearing. Any party may request disqualification of a hearing officer prior to the commencement of a prehearing conference or first day of hearing on the merits, whichever is earlier.<sup>2</sup> Motions requesting disqualification of a hearing officer shall be filed directly with the hearing officer, who shall issue the initial ruling on the matter. The ruling would be subject to review after the hearing officer has issued his or her initial decision on the merits of the case. This practice is consistent with the recently amended APA, (Government Code section 11512), and with the existing hearing procedures that have been adopted for the Roadside Inspection Program, Title 17, CCR, section 60075.7<sup>3</sup> The procedure avoids delay and best utilizes the resources of the agency.

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<sup>2</sup> Disqualification may also be requested of reviewing officers, including members of the state board.

<sup>3</sup> The U.S. EPA has in a Notice of Proposed Rule Making for *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance of Corrective Action Orders, and the Revocation, Termination or Suspension of Permits*, 63 Fed. Reg. 9464, has issued an intent to amend its disqualification procedures, 40 CFR section 22.04(d) consistent with this proposal. In proposing the amendment, U.S. EPA notes that its proposal is consistent with federal court practice.

### 3. Ex Parte Communications

As in the administrative hearing procedures for review of citations, the staff is proposing inclusion of this subarticle believing that it is important to clearly spell out the prohibitions and the obligations and responsibilities of the individual parties, the hearing officer, and reviewing authorities regarding off-the-record communications during the course of a proceeding. Proposed sections 60055.13 and 60065.13 respectively identify the types of communications that cannot be shared between the hearing officer and one party to the proceedings without notice and opportunity being provided to other parties to hear and respond to the communication. In general, no oral or written communication, including pleading, letter, document, or other writing, may be provided by a party to a hearing officer unless the oral communication is made before all parties to the proceedings or unless copies of the subject documents have been served on the other parties.

The proposed procedures, however, would allow the hearing officer and the executive officer and the Board -- when respectively reviewing and issuing administrative hearing decisions in complaint and petition for review hearings -- to communicate with employees of the ARB, who have not been involved in the investigation or prosecution of the case. Such communications would be permitted for the limited purpose of allowing the employee to assist the decision makers in determining motions regarding confidential business information (i.e., trade secrets), and reviewing the evidence in the record, and drafting decisions and orders. The exception would not allow the employee to supplement, diminish, or modify the record of the hearing. Specifically, the employee could not provide advice or assistance going to the weight or credibility of the evidence. The availability of assistance through consultation should result in more accurate decision making. The exception is consistent with the APA. (Government Code section 11430.30.)

The proposed procedures would set forth the procedures that the hearing officer is to follow if he or she receives a prohibited communication either prior to or during the course of the proceedings. The proposal also makes it clear that receipt of ex parte communications may be a cause for disqualification of the hearing officer. The same requirements and obligations would also apply to the executive officer when reviewing a request for reconsideration of an issued decision and the state board when reviewing a proposed decision of the hearing officer in a petition for review hearing.

### 4. Issuance of and Response to Complaints

Pursuant to section 43028 of the Health and Safety Code, the ARB has authority to issue administrative complaints for all violations arising under its fuel's program for which the penalty amount does not exceed \$25,000 per day per violation and for which the total penalty does not exceed \$300,000. Under these proposed regulations and the amendments to Title 17, CCR,

section 60075.1, et seq., complaints would not be issued for those violations that are determined to be Class I violations for which a citation has been issued. Such violations would be subject to the citation hearing process.

The proposed procedures would require that the ARB include specific information within each complaint that is issued to assure that the respondent has adequate notice of the alleged violations and the facts constituting the charges against it. Among the information that a complaint would require is the name of the parties who are alleged to have committed the violation, the facts surrounding the violation, the proposed penalty, reference to the hearing procedures, and notice that the alleged violator has 30 days from the date of service of the complaint to respond to the complaint and request a hearing and that failure to do so could result in an entry of default against the respondent. Additionally, the procedures would require that respondent be provided with notice to represent him or herself or retain a representative at his or her own expense, and, if necessary, may obtain an interpreter for language assistance.

After receipt of the complaint, the respondent may elect to admit or deny each allegation and accusation of the complaint and raise new matters by way of affirmative defenses. Under the proposed procedures, the respondent would be required to file his or her response within 30 days after service of the complaint, but that date may be extended for 30 additional days by stipulation with the complainant, or up to an additional 60 days by the hearing officer if good cause exists and the complainant would not be prejudiced. The issues for hearing would be limited to the issues raised in the complaint and response. Under the proposed procedures, if the alleged violator failed to respond within the time provided, a default would be entered against that person who would be found to have effectively waived his or her right to contest the matters alleged in the complaint.

#### 5. Filing and Initial Review of Petitions of Executive Officer Decisions

These provisions closely parallel the existing adjudicatory hearing procedures and provide that a party aggrieved by an executive officer decision may file a petition for review of that decision with the clerk of the board within 30 days after receipt of the decision. This time may be extended for good cause. A petition would be required to include specific information, including a verified statement of facts, the reasons for which review is being requested, and the relief that petitioner is seeking.

After a petition is filed, the petition would be referred to the hearing office for assignment and initial review by a hearing officer. Formerly, the initial review was conducted by the chairperson of the state board. The staff recommends the proposed change to better utilize the agency's resources. For all petitions, except those objecting to the denial of a motor vehicle certification, the initial review would be limited to determining if the executive officer's decision involved a matter for which a hearing is required by law. All decisions involving recalls under

Health and Safety Code section 43105 and revocations or suspensions of licenses for vehicle emission test laboratories and certifications of motor vehicle engine families would require a hearing. A petition objecting to a denial of motor vehicle certification would be entitled to a hearing unless the hearing officer determines that the petition has not raised a substantial factual issue, in which case the hearing officer may summarily deny the petition. This qualified right to hearing is consistent with U.S. EPA hearing procedures. See 40 Code of Federal Regulations sections 86.444-78, 86.614-84, 86.1014-84, and 86.1115-87; *Mathews v. Eldridge*, 424 U.S. 319 (1976). A finding by the hearing officer that a petition is not subject to hearing may, upon request of the petitioner, be reconsidered by the Board itself, under proposed section 60055.39.

Generally, within 10 days after issuance of the hearing officer determination that a hearing is required, the executive officer would be required to file a response to the petition. The response would contain the reasons for and the facts in support of the decision of the executive officer under review. The executive officer may obtain an extension of time if a petition for review raises claims or issues in a manner that is so vague or ambiguous that the executive officer could not reasonably be expected to respond. In such instances, the executive officer may, within the time allotted for responding, move that the hearing officer require a more definite statement of matters covered in the petition for review. The executive officer would have 10 days from the date the amended petition was received to file its response.

#### 6. Stays Pending Hearing

As with the existing procedures, the proposed hearing procedures would require that all petitions for review of executive officer decisions relating to motor vehicle recalls be automatically stayed upon receipt of a petition for review. The hearing officer would have discretion to issue a stay regarding other matters covered by a petition for review. In making his or her decision, the hearing officer would balance the effects of a stay on the public health, safety and welfare against the harm that may be suffered by the party if a stay is not granted. In contrast to the existing procedures, the proposed procedures would not provide for automatic stays in petitions to review decisions relating to suspension and revocation of motor vehicle emission test laboratory licenses. The staff believes that it is more appropriate to consider the question of issuing stays for these matters, as well as all other matters with the exception of actions to recall, on a case by case basis. The relative benefits and costs associated with issuance or non-issuance of a stay are not so clear-cut that a decision of general policy can be made.

If the hearing officer were to grant a stay pending hearing on the petition, and the petition is subsequently dismissed by the Board, the Board would have discretion to order the petitioner to undertake remediation to address the increased emissions released as a consequence of the stay. The ability to order remediation, when appropriate and necessary, would provide the agency with additional flexibility in balancing the potential harm to health and welfare of the state in granting a stay against the harm that would be incurred by a stakeholder if a stay were not granted.

The hearing officer does not have authority to grant stays pending review of petitions for relief from executive officer decisions denying certification of a motor vehicle engine family. Such relief would have no affect. A manufacturer may only sale or import motor vehicles in California if an executive order granting certification to the engine family has been issued. A stay of a denial of certification would not provide the manufacturer with the necessary certification. To order the issuance of a certification or conditional certification would exceed the authority of the hearing officer. This is not to say that an aggrieved party cannot petition the executive officer for such relief.

The proposed hearing procedures for review of complaints similarly provides that a respondent who has been issued a cease and desist order in conjunction with an issued complaint, may request stay relief from the hearing officer. The hearing officer may grant a stay pending issuance of his or her decision, unless the hearing officer finds that the adverse effects of a stay on the public health, safety and welfare outweigh the harm to those persons directly affected by the lack of a stay. The hearing officer may conduct a hearing or request such submissions by the parties as necessary to obtain information to make a determination on this issue.

## 7. Prehearing Procedures

(a) Scheduling of Hearings: Under the proposed procedures, the hearing office would schedule all hearings to consider the merits of complaints within 30 days of the receipt of the response to a complaint. Except in the case in which a motion for expedited hearing has been granted, the hearing office would also schedule hearings to consider petitions for review within 30 days of the receipt of the filing of the executive officer's response to a petition. In scheduling hearings, the hearing office would make every effort to hold hearings within 180 days from the date of issuance of the complaint or receipt of the petition for review. Although the hearing date may be postponed beyond that time for good cause and in the interest of justice, it is not expected that this would occur often. It is in the interest of the parties and the public that hearings occur as expeditiously as possible. Even in the more complicated cases, 180 days should, in most instances, afford sufficient time for the parties to properly prepare their case.

The regulations would provide motor vehicle manufacturers the opportunity to request expedited scheduling of hearings in proceedings that request review of executive officer decisions denying certification to motor vehicle engine families. The staff believes that expedited review would be warranted, in certain circumstances, given the economic consequences that a manufacturer may suffer because of the denial of certification. As previously stated, in such cases a stay of the executive officer decision is inappropriate and other forms of relief are not readily available. Under the proposed procedures, the hearing officer would be required to grant a manufacturer's petition for expedited scheduling if the manufacturer is able to present sufficient evidence to demonstrate a reasonable likelihood that it may suffer serious competitive harm if the petition is not granted. Under the expedited hearing schedule, to afford the quickest possible

hearings, the parties would be entitled to limited discovery and would not be provided the opportunity to submit closing written arguments. For similar reasons, the hearing officer would be required to issue his or her recommended decision within 10 days of the close of hearing.

(b) Case Consolidation; Separation: The hearing officer would have discretion, in the interest of conserving the time and resources of the parties and the hearing office and in the interest of justice, to consolidate either cases involving the same parties or involving common issues of law and fact among several different parties. Similarly, the hearing officer would have discretion to order separate hearings on any issues in furtherance of convenience or to avoid prejudice to any of the parties. These provisions closely parallel those of the APA, as amended. .

(c) Prehearing Conferences: The hearing officer would also have discretion to hold prehearing conferences where necessary to assist the parties in simplifying or narrowing issues, stipulating to facts not in issue, or arranging times for the parties to exchange discovery. To ensure that the prehearing conferences do not cause unnecessary delay, the regulations would provide specific deadlines for the conducting of such hearings, and place specific obligations on the parties to prepare prehearing statements that include specific information that will allow for productive meetings. The procedures for prehearing conferences are consistent with comparable provisions in the APA, as amended.

(d) Settlement Conferences: The proposed procedures would also include formal procedures for conducting settlement conferences to encourage the parties to settle the matters at issue short of litigation. To this end, the hearing office would make a hearing officer available to assist the parties. The assisting hearing officer would not be the same hearing officer that has been assigned to hear the case on the merits, unless the parties expressly make such a request. In the case where the parties could not reach settlement, all discussions regarding settlement would be privileged and not made part of the record in the hearing on the merits.

(e) Discovery: Under the proposed procedures, discovery would primarily be limited to access to (1) the names and addresses of witnesses (other than confidential informants) to the events at issue, and (2) writings, written statements, or things that are relevant to the issues for hearing. For the most part, inspection or investigative reports that pertain to the subject matter of the proceeding and are prepared by, or on behalf of, any party would not be subject to discovery. Discovery of such records would only be permitted as to the names and addresses of witnesses or persons (other than confidential informants) having personal knowledge of the underlying issues of the hearing; recordings of matters perceived by the investigator (as opposed to his or her analysis or conclusions) during the course of the investigation; and written statements by such persons that pertain to the subject matter of the proceedings and are otherwise admissible. Nothing in the section would authorize the inspection or copying of any writing or thing which is otherwise privileged from disclosure by law or protected as the attorney's work product.

The proposed regulations would restrict the use of other discovery, including depositions, except as expressly provided in the procedures. Although the APA provides that depositions may only be used under limited circumstances, when a party is able to demonstrate that the testimony of a witness would not otherwise be available at the hearing, and the California Law Review Commission recommended that discovery should be very restricted (*Administrative Adjudication by State Agencies*, 25 Cal. L. Revision Comm'n 55, 115 (1995) ["the extensive discovery available in civil proceedings is inappropriate for administrative adjudications, which should be simple, quick, and inexpensive"]), the staff believes that additional discovery may be necessary, at times, to properly prepare for and to provide full and fair hearings. Accordingly, the proposed procedures would provide the hearing officer with authority to allow additional discovery for good cause. To permit additional discovery, the hearing officer would be required to expressly find that (1) the additional discovery would not unreasonably delay the proceedings; (2) the information sought from the discovery would not be otherwise obtainable; and (3) the information would be relevant and have significant probative value on a disputed issue of material fact. The hearing officer could also allow for the taking of depositions when he or she can find that there is substantial reason to believe that relevant and probative evidence may not otherwise be preserved for presentation by a witness at hearing.

The proposed discovery provisions should ensure that all parties have the opportunity to properly prepare and evaluate their case for hearing. At the same time, the provisions would establish strict time lines for requesting discovery. This should encourage timely preparation and expeditious adjudication of the merits of the case and prevent abuse of the process.

Under the proposal, the hearing officer, upon motion, would have authority to issue protective orders to protect the confidentiality of documents identified as trade secrets and otherwise confidential. The motion for protective order could be filed by the parties to the proceeding who possess or control the document(s) at issue, third-parties who own or control the document(s) at issue and who have made a claim that the information is confidential, or by the hearing officer. In fashioning a protective order, the hearing officer would balance the needs for confidentiality of the party or person claiming that the information is confidential against the needs of the party seeking the information to prepare its case. Authority to grant protective orders is necessary to assure that the two conflicting interests are properly protected and that a full and fair hearing is provided to all parties.

The hearing officer would also have authority to compel discovery. This provision parallels Government Code section 11507.7 of the APA, and provides that a party who has been refused or denied discovery may petition the hearing officer for relief by way of a motion to compel discovery. After the opposing party has had the opportunity to respond to the motion and a hearing has been held, the hearing officer would issue a decision granting or denying the motion.

It is proposed that subpoenas and subpoenas duces tecum be issued in accordance with the procedures set forth in article 11, chapter 4.5 of the APA, Government Code section 11450.05-11450.50. Specifically, the new section would set forth the process for issuing and opposing subpoenas to compel third-party witness attendance at hearings and, if applicable, depositions, and to produce documents. The section also provides that subpoenaed witnesses would be entitled to mileage and appearance fees. The ability to subpoena witnesses and obtain documents from nonparties would help to assure that all parties are provided equal access to material evidence at the administrative hearing and that the record is complete.

It is further proposed that 10 days prior to the scheduled hearing, each party provide a list of, and information on, all witnesses they propose to have testify. The provision would guard against any party suffering from last second surprise or undue prejudice from the appearance of unscheduled witnesses. To this end, the hearing officer would have discretion to prohibit the testimony of any witness not on the prehearing witness list.

(f) Summary Determination of Issues: The proposed prehearing procedures would allow a party to file a motion for summary determination of those issues in which there is no dispute regarding material facts. This process would allow for expedited resolution of specific issues or the case as a whole, saving the time and resources of the parties and the hearing office. If the hearing officer agrees that there are no disputed facts, he or she may decide the case prior to hearing based on the legal arguments submitted by the parties. However, the hearing officer would be required to deny the motion if disputed facts exist. In those cases where a party opposing a motion for summary determination can establish that it is unable to obtain information that would indicate that disputed facts exist, the hearing officer may deny the motion or may order a continuance to permit affidavits to be obtained or may permit the party to undertake additional discovery consistent with the discovery provisions provided in these regulations.

## 8. Contempt and Sanctions

The proposed procedures would provide the hearing officer with authority to seek contempt and sanction orders. This authority would allow the hearing officer to properly enforce issued orders and help ensure the credibility and viability of the hearing process and ultimately the underlying programs. These provisions are intended to mirror the recently amended APA, Government Code sections 11455.10, et seq., as well the enforcement provisions found at Government Code sections 11186 through 11188. These provisions allow the hearing officer to proceed to state court for contempt proceedings against a party guilty of misconduct.

It is further proposed that the hearing officers be given authority to assess reasonable expenses, including representation fees, against a party, its representative, or both, whose bad faith actions or frivolous tactics have caused an opposing party to incur specific and identifiable unnecessary expenses. The ability to obtain sanctions against disobedient, disorderly, and

disruptive participants in the hearing process should enable the hearing officer to maintain the integrity and decorum of the process, which should provide for more expeditious, efficient and fair hearings.

## 9. Hearings

In addition to the enforcement provisions set forth above, the hearing officer would have authority to take a hearing off calendar or enter a default order against a party who, having received notice of the hearing, fails to appear at a scheduled hearing. These provisions would encourage attendance at all scheduled hearings, avoid unnecessary delay, and ensure expedited disposition of cases.

Under the proposal, each party at a complaint and petition for review hearing would be provided with basic rights to guarantee that it has full and fair opportunity to present evidence and argument to fully represent its position before the hearing officer. Although hearings would be conducted in English, any party may ask for the assistance of interpreters, pursuant to proposed sections 60055.10 and 60065.10. In conducting fair and impartial hearings that assure due process, all parties would have the right to call, examine, and cross-examine witnesses and present relevant evidence.

In a complaint proceeding, the burden of proof and of going forward would lie with the ARB, the complainant. The respondent would subsequently have the right to examine, respond to, or rebut the allegations of the complaint and any proffered evidence and material. Subject to reasonable limitations by the hearing officer, the parties would respectively have the right to offer rebuttal evidence that is necessary to resolve disputed issues of material fact.

In a petition for review hearing, the executive officer would have the initial burden presenting evidence that those parts of the executive officer decision specifically challenged in the petition for review are supported by facts and applicable law. The petitioner would then have the right to examine, respond to, or rebut any contentions raised by executive officer, and may offer any documents, testimony, or other evidence which bears on relevant issues. At the close of the petitioner's presentation, the parties may present any rebuttal evidence that is necessary to resolve disputed issues.

Under the proposed procedures, the hearing officer would govern the conduct of the hearing, make decisions on the admissibility of evidence and take whatever actions are necessary for a full and fair adjudication of the matter. Under his or her authority, the hearing officer would be able to limit the number of witnesses and the introduction of irrelevant, immaterial, unduly repetitious or unreliable evidence; require authentication of written evidence; call and examine witnesses on his or her own motion; and admit into evidence any relevant and material evidence in the interest of securing a complete record.

All hearings would be recorded electronically, however, to conserve the resources of the agency, transcripts would be prepared only when ordered by the hearing officer to permit a full and fair review of the case or specifically requested by one of the parties or other interested person(s). The recordings of the ARB are the official recordings of the proceedings. If a transcript is not ordered by the hearing officer, the parties or person(s) requesting a copy of the transcript shall bear the cost of production.

At the hearing, all oral testimony would be required to be given under oath or affirmation. As discussed above, evidence could be admitted in the form of affidavits or declarations without cross examination if consented to, or the right is waived by, the opposing party. The administrative hearing would not be required to follow the technical rules of evidence that apply in judicial courts of law. Evidence of the sort a reasonable person would typically rely on in the conduct of serious affairs would be allowed. Hearsay evidence may be introduced, but generally would not be sufficient by itself to support a finding. The rules of privilege would apply to the extent provided by statute. These relaxed rules of evidence would enable non-lawyers, including parties appearing on behalf of themselves, to fully participate in the hearings, without prejudice.

Under the proposed procedures, a party would be able to introduce an affidavit or declaration into evidence and have it treated the same as oral testimony, if prior to hearing, it provides a copy of the affidavit or declaration to the opposing party and the opposing party does not request to cross-examine the affiant or declarant within seven days of receipt of the document. However, if the opposing party requests the right to cross-examine, it should be afforded such an opportunity. If it is not, the hearing officer would have discretion whether to allow the document into evidence, based in the interest of justice in providing a full and fair hearing. If the hearing officer allows the document in, the evidence would only be given the same effect as other hearsay evidence. This section follows Government Code section 11514 of the APA, and parallels a similar provision in Title 13, CCR, section 60075.1, et seq., administrative hearing procedures to review citations.

To assure full and fair hearings, the hearing officer would be authorized to take official notice of generally accepted technical and scientific matters or the official acts of the Board. To this end, the Evidence Code, sections 450, et seq., regarding official notice would also apply to proceedings under these rules. As part of this process, any party opposed to the official notice would be afforded the opportunity to oppose the introduction of such evidence. The hearing officer would also be authorized to admit into evidence trade secret or otherwise confidential information. If confidential information is offered into evidence, the hearing officer would be required to first consider the evidence in camera and issue a supplemental decision or order, if necessary, to protect confidentiality of the evidence.

Upon the request of a party, the hearing officer would have discretion to exclude a prospective witness from the hearing room prior to his or her testimony. The hearing officer's determination would balance the potential for the testimony to be influenced by the proceedings against the right of the witness to attend a public hearing. This provision is consistent with Evidence Code section 777.

Under the proposed hearing procedures, the hearing officer would have discretion as to whether oral and/or written closing arguments are appropriate. In making the determination, the hearing officer would be required to consider whether the argument would be productive and not unreasonably delay the disposition of the proceedings.

#### 10. Decisions of the Hearing Officer

##### a. Default Order:

As indicated above, under the proposed procedures, the hearing officer may order the entry of default against a party who fails to take actions required under the procedures to further the case towards resolution. Among other things, a default could be entered against a respondent for failing to file a response to a complaint within 30 days after issuance of the complaint, or against any party who fails to appear at a scheduled hearing after receipt of notice. A default by the respondent in a complaint proceeding would result in an order being issued against that party finding that it has violated the statutes, rules, or regulations alleged in the complaint and making it subject to penalties for such violations. A default by the state board in a complaint proceeding would result in the dismissal of the complaint with prejudice. In a petition for review hearing, a default by the petitioner would result in a recommended order that the petition be dismissed. A default by the staff of the state board in a petition for review hearing would result in a recommended decision to the Board that the executive officer decision under review be revoked. After entry of default, the hearing officer would be able to reconsider his or her decision upon a showing of good cause by the defaulting parties. A default order would be a decision or order after hearing which is subject to reconsideration by either the executive officer or the Board itself and ultimately judicial review.

##### b. Order or Decision of the Hearing Officer After a Complaint Hearing:

The proposed procedures would require that within a reasonable period of time after the conclusion of a complaint hearing, the hearing officer would issue his or her order or decision on the merits. The hearing officer would make every effort to issue the order or decision within 60 days of the close of the hearing or as expeditiously as possible thereafter. An order or decision of the hearing officer would be required to be in writing, make findings of fact relevant to the issues for hearing, and set forth conclusions of law based upon those facts. The hearing office would be required to serve a copy of the order or decision on each party or representative

together with a statement informing the parties of their right to petition the executive officer for reconsideration. Within five days of the decision or order, a party could request, or the hearing officer, on his or her own motion, could order that the order or decision be modified to correct a mistake of law or fact. This procedure would allow the hearing officer to correct an erroneous decision where the error is brought to his or her attention shortly after the hearing. However, a party would not have to exhaust this option to formally request that the executive officer reconsider the matter.

c. Penalty Assessment Criteria:

In assessing penalties for complaints issued under Health and Safety Code section 43028 for which violations are found, the hearing officer would be required to consider the criteria set forth in section 60065.39, which is consistent with the Legislative directives of Health and Safety Code section 43031. Among the factors to be considered are: the extent of harm caused by the violation to public health and safety and to the environment; the nature and persistence of the violation; the compliance history of the respondent; the preventive efforts taken by the respondent; the innovative nature and the magnitude of the effort required to comply; the efforts to attain, or provide for compliance; and the cooperation of the respondent.

d. Proposed Order or Decision After Petition for Review Hearing; Decision of the Board:

At the conclusion of a petition for review hearing, the hearing officer would issue a proposed order or decision on the merits. The Board itself would retain authority to issue the final order or decision after reviewing the hearing officer's proposal. Similar to complaint proceedings, the hearing officer would be required to issue the proposed order or decision on the merits within a reasonable period of time after the close of hearing. The hearing officer would endeavor to issue the proposed order or decision within 60 days of the close of the hearing or as expeditiously as possible thereafter. As with a decision of a hearing officer in a complaint proceeding, the proposed order or decision would be required to be in writing, make findings of fact relevant to the issues for hearing, and set forth conclusions of law based upon those facts. The hearing officer would certify the administrative record and forward a copy of the order or decision to the clerk of the board. The clerk of the board would issue a notice that the Board will consider adoption of the proposed order or decision at a public hearing and would serve copies of the hearing officers proposed order or decision on the parties or their representatives.

Within 60 days of receipt of the proposed order or decision, the Board would conduct a public hearing to consider the proposed order or decision, and may take any of the following actions: (1) adopt the proposed order or decision in its entirety, (2) make technical or minor

changes to the proposal, (3) refer the matter back to the hearing officer for the taking of additional evidence, or (4) issue its own written decision, based on the administrative record, and any evidence presented to the Board during the public hearing.

#### 11. Reconsideration

While the order or decision of the hearing officer in a complaint proceeding would generally become the final order or decision of the agency, the executive officer would be authorized to reconsider a hearing officer order or decision on his or her own motion or at the request of a party. A party would have 20 days from the date of issuance of the hearing officer order or decision to file a request for reconsideration. Similarly, in a petition for review hearing, any party may within 20 days of issuance of the Board's order or decision, file a request that the Board reconsider the order or decision.

The executive officer or the Board, respectively, may order reconsideration of the order or decision in a complaint or petition for review proceeding for the following reasons: the hearing officer, in a complaint proceeding, or the Board, in a petition for review hearing, has exceeded its authority in issuing the order or decision or has misapplied applicable law; the order or decision was procured by fraud; the order or decision is not supported by the evidence or the findings of fact; or new, material evidence has been discovered that was previously unavailable at the time of the hearing. Upon reconsideration, the executive officer or the Board, as applicable, could affirm, rescind, or amend the findings of fact or the conclusions of law of the order or decision that is under reconsideration. If additional evidence is necessary for the executive officer or the Board respectively to act in a complaint or petition for review hearing, the executive officer or the Board may reopen the record itself to take new evidence or may refer the matter back to the hearing officer.

Any request for reconsideration would be deemed to have been denied if it has not been acted upon by the executive officer or the Board within 20 days of service. This should be sufficient time for the executive officer or the Board to make a preliminary determination regarding reconsideration in the respective types of hearings while preventing the use of requests for reconsideration to be employed as a delay tactic.

#### 12. Final Order or Decision; Judicial Review

If reconsideration is not requested or is denied, the underlying order or decision of the hearing officer in a complaint proceeding and the Board in a petition for review hearing would become the final order or decision of the agency. If reconsideration is granted, the order or decision that is subsequently issued respectively by the executive officer or the Board would become the final order or decision of the agency. If the order or decision is adverse to the respondent in a complaint proceeding or to the petitioner in a petition for review hearing, the

party may seek judicial review by administrative mandamus pursuant to section 1094.5 of the Code of Civil Procedure within 30 days after the decision is mailed. It is not necessary for the party to request reconsideration to exhaust administrative remedies prior to requesting judicial review.

Under section 1094.5(b) of the Code of Civil Procedure, the respondent in a complaint proceeding or the petitioner in a petition for review hearing may petition the court as to whether the ARB has proceeded without, or in excess of its, jurisdiction; conducted a fair trial; or committed prejudicial abuse of discretion. Abuse of discretion is established if the agency has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence. In determining abuse of discretion, the court will determine whether the findings are supported by substantial evidence in light of the whole record. Code of Civil Procedure section 1094.5(c).

### III. DUE PROCESS

In Mathews v. Eldridge (1976), 424 U.S. 319, the Supreme Court identified three factors that must be evaluated and balanced in deciding whether an administrative procedure provided to an individual prior to deprivation of a property interest meets the due process requirements of the Fifth Amendment of the Constitution: (1) the magnitude and nature of the individual interest at stake, (2) the risk of an erroneous deprivation of that interest and the benefit of additional procedures in reducing that risk, and (3) the governmental interest in not providing such additional procedures. In general, a proceeding before an administrative hearing officer or board is adequate if the basic requirements of notice and opportunity for hearing are met. (See People v. Ramirez (1974) 25 Cal 3d. 260, 268; 7 Witkin, Summary of Cal. Law (9th ed., 1988) Constitutional L, §518, p. 715.) “The fundamental requirement of due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which the constitutional protection is invoked.” (Anderson Nat. Bank v. Lockett (1944) 321 U.S. 233.)

The proposed amendments to the administrative hearing procedures for review of citations and the proposed procedures for review of complaints and petitions for review satisfy due process requirements. All three procedures provide respondents with the notice and an opportunity to be heard before any deprivation of property interest. The proposed provisions would require that the citations and complaints specifically identify the respondents against whom the allegations are filed and provide, in writing, a description of the alleged violations and the proposed penalty that provides sufficient information in which to prepare a defense. Additionally, the respondents would be provided with a copy of the administrative procedures at the time of issuance of the citation or complaint and informed, in writing, of their right to a hearing to contest the alleged violations. At the hearing itself, all parties would be offered the opportunity to present, respond to, and rebut evidence and to confront witnesses under oath.

Additionally, the hearing would be conducted before a neutral hearing officer who has not served in the capacity of an investigator, prosecutor, or advocate in the case. The hearing officers of the state board are qualified administrative law judges with expertise in air quality law. The administrative hearing office of the ARB is an independent of the office and is not subject to the authority, direction, or discretion of either the Executive Office or the Office of Legal Affairs. OAH is an independent agency of the State of California. The proposed provisions prohibiting ex parte communications between those employees engaged in the investigative and prosecutorial functions of the agency and the hearing officers assigned to hear cases further protects the independence and impartiality of the hearing process.

All decisions issued under the administrative hearing procedures, including decisions on rehearing and reconsideration, would be required to be in writing, based on the administrative record, and state the factual and legal basis for the decision.

#### IV. SUMMARY OF RECOMMENDED ACTION

Staff recommends that the Board adopt the proposed amendments to sections 60075.1 through 60075.46, the amendment of section 60040, and adoption of sections 60055.1 through 60055.43 and 60065.1 through 60065.45, Title 17, California Code of Regulations, as set forth in Attachments A through D. The amended administrative procedures for review of citations (sections 60075.1, et seq.) and new procedures for review of complaints and petitions for review (sections 60040.1, et seq.) provide a streamlined hearing process that will afford all parties full, fair, and impartial hearings. Use of the procedures in lieu of crowded civil court dockets should provide for more expeditious hearings and resolution of cases. In contrast to judicial proceedings, administrative hearings should be both time and cost effective for both the agency and the parties.

#### V. ALTERNATIVES

##### A. One General Administrative Hearing Procedure

In considering the amendments to the Roadside Hearing Procedures, staff considered the alternative of having just one general hearing procedure for all violations. The staff rejected this option because of the significant differences that exist between those violations that would be subject to issuance of citations and those subject to complaints. The staff believes that for the less serious, less complex types of violations, the less formal citation procedure would be most appropriate. For the foreseeable future, the great majority of citations will be issued under the Roadside Inspection Program. Like the citations that are issued under that program, staff believes that most citations issued under Health and Safety Code section 43028 will be the type of violation that can be discerned and cited at the time of the violation's discovery and will include insubstantial evidentiary records. Given these facts and the anticipated high volume of citations

that would be issued under the affected programs, staff believes that best use of its resources would be to continue the existing procedures of issuing citations and having those respondents wanting to contest the citations to request a hearing.

In contrast, for the more serious, complex violations, staff believes that the more formal complaint proceedings would be most appropriate. These cases typically require more investigation, complex fact patterns, and significantly higher penalties. Consequently, staff believes that the more formal complaint and response process would better define the issues for hearing. Also, because of the nature of these violations, staff believes that the more formal procedures for prehearing conferences and discovery would be more appropriate for these types of cases.

**B. Hearings Should be Conducted Using Administrative Law Judges from the Office of Administrative Hearings.**

In considering amendments to the citation hearing procedures and proposing new adjudicatory hearing procedures for complaint and petition for review hearings, the staff considered alternative proposals that would have administrative law judges from the Office of Administrative Hearings (OAH) act as the sole hearing officers under these procedures. In proposing that hearings be assigned to hearing officers of the ARB, unless its staffing and resources would not permit such assignments, the staff's recommendation is consistent with the Board's present practice that it first adopted in 1991 for the Roadside Inspection hearing procedures. The specialized nature of the matters at issue in the proposed hearing procedures makes it preferable to use hearing officers with special knowledge and expertise in the area of air quality law and the policies of the ARB.

The question of using a central panel of administrative law judges from OAH has been a topic of significant discussion in California for over 50 years, since adoption of the State APA. See *Administrative Adjudication by State Agencies*, 25 Cal. L. Revision Comm'n 55 (1995), 93. Nonetheless, as the California Law Revision Commission (Commission) found, more than 95 percent of the state's administrative law judges and hearing officers continue to be directly employed by the state adjudicating agencies, not OAH. *Id.*, at 93. Recently, in adopting amendments to the APA, the Legislature accepted the recommendations of the Law Revision Commission and decided that it was not necessary that all State agencies use the OAH central hearing panel to assure impartiality of hearing officers. (Stats. 1995 ch. 938 (SB 523) and stats. 1996 ch. 390 (SB 794); see *Administrative Adjudication by State Agencies*, 25 Cal. L. Revision Comm'n, at 93.) Rather, to insure impartiality, the APA, as amended, requires that all state agencies separate its adjudicative function from the investigative, prosecutorial, and advocacy functions within the agency. (Government Code section 11425.10(a)(4).) It further provides that no person may serve as a hearing officer in an adjudicative proceeding if the person has served as investigator, prosecutor, or advocate in the proceeding or its preadjudicative stage or if the

person is subject to the authority, direction, or discretion of a person who has served as investigator, prosecutor, or advocate in the proceeding or its preadjudicative stage. (Government Code sections 11425.30(a).)

The proposed hearing procedures conform with these requirements. As stated, the ARB hearing office would be staffed by full-time ALJs whose only function would be conducting adjudicatory hearings. They would have no role in the investigation or prosecution of the hearings that they preside over. Additionally, the hearing office would be independent and wholly autonomous from the Executive Office, the Office of Legal Affairs, and the divisions that have direct responsibility for investigating, prosecuting, and advocating the cases that appear before the hearing officers.<sup>4</sup> This organizational structure should ensure the impartiality of the hearing officers and provide basic fairness and due process for all parties. By incorporating the Administrative Adjudication Bill of Rights, Article 6 of the APA, the proposed procedures further ensure fundamental protection of due process and fairness by providing notice and opportunity to be heard, broadly prohibiting ex parte communications, requiring decisions to be based exclusively on the record of the proceeding, having open hearings, etc. (Government Code sections 11425.10, et seq.)

Although, it has been argued that the use of agency officials to adjudicate cases is inherently biased, the courts and lawmakers have consistently rejected such propositions. (See Withrow v. Larkin (1975) 421 U.S.35 [95 S.Ct. 1456]; Kloepfer v. Comm’n on Judicial Performance (1989) 49 Cal.3d 826 [264 Cal.Rptr. 100] and Griggs v. Bd. of Trustees of Merced Union High School Dist. (1964) 61 Cal.2d 93 [37 Cal.Rptr. 194]; see also the federal Administrative Procedure Act, 5 U.S.C. section 554(d); California APA, Government Code section 11425.10(a)(4).) In Withrow v. Larkin, the Supreme Court found that it is not a per se violation of due process even when the investigative and adjudicative functions are combined in the same person.

“The contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication has a much more difficult burden of persuasion to carry. It must overcome a presumption of honesty and integrity in those serving as adjudicators; and it must convince that, under a realistic appraisal of psychological tendencies and human

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<sup>4</sup> The Law Revision Comments explaining Government Code section 11425.10(a) states:

[A] person has “served” in any of the capacities mentioned [investigator, prosecutor, or advocate] if the person has personally carried out the function, and not merely supervised or been organizationally connected with a person who has personally carried out the function. The separation of function requirements are intended to apply to substantial involvement in a case by a person, and not merely marginal or trivial participation. The sort of participation intended to be disqualifying is meaningful participation that is likely to affect an individual with a commitment to a particular result in the case.

weakness, conferring investigative and adjudicative posers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.” Withrow v. Larkin (1975) 421 U.S. at 47.

Clearly, if a combination of functions lying with a single person does not violate due process, the proposed administrative hearing procedures that expressly separate the adjudicatory function from the investigatory and prosecutorial functions do not violate due process.

#### C. Class I Violations

Rather than setting forth criteria for determining Class I violations that would be subject to citations, staff considered adopting an express list of violations that would be conclusively presumed to be Class I violations. Staff, however, determined that seriousness or complexity of a violation is very dependent upon the facts of the case and the compliance history of the respondent. Thus, it would be difficult to accurately and exhaustively create such a list. The considered alternative was consequently rejected.

#### D. Conclusion

Staff has determined that no alternative considered would be more effective in carrying out the purpose for which the regulations are proposed or would be as effective or less burdensome to affected private persons than the proposed regulations.

### VI. IMPACT ON THE ENVIRONMENT, BUSINESS AND ECONOMY OF THE STATE

The proposed amendments to sections 60075.1 through 60075.46 and the amendment of section 60040 and adoption of sections 60055.1 through 60055.50, Title 17, CCR will not have any impact on the environment, business, or the economy of the state. No impact is foreseen in that the hearing procedures only address the judicial forum of enforcement and not enforcement itself.

### VII. REFERENCES

1. Michael Asimow, “Toward a New California Administrative Procedure Act: Adjudication Fundamentals,” 39 UCLA Law Review 1067, June 1992.

2. *Administrative Adjudication by State Agencies*, 25 Cal. L. Revision Comm’n Reports 55 (1995), pg. 75-120.

Attachment A

PROPOSED

State of California  
Air Resources Board

CALIFORNIA REGULATIONS FOR ADMINISTRATIVE HEARING PROCEDURES FOR REVIEW  
OF CITATIONS

Amended:\_\_\_\_\_

**NOTE:** Proposed new language is indicated by underline and proposed deletions are shown in ~~strikeout~~.

## PROPOSED REGULATION ORDER

**Amend Article 5, Subchapter 1, Chapter 1, Division 3, Title 17, California Code of Regulations, to read as follows: Article 5. Administrative Hearings Procedures for Review of Citations ~~the Heavy-Duty Vehicle Roadside Smoke and Tampering Inspection Program~~**

### Subarticle 1. General Provisions

#### § 60075.1. Applicability.

These rules shall govern hearings to review citations issued by the state board pursuant to Health and Safety Code sections 43028, 43031(a) and 44011.6.

NOTE: Authority cited: Sections 39600, 39601, 43028, 43031(a) and 44011.6(m)(i), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 43028, 43031(a) and 44011.6, Health and Safety Code.

#### § 60075.2. Definitions.

(a) The definitions applicable to these rules include those set out in the Health and Safety Code (commencing with section 39010) ~~and in~~ Title 13, California Code of Regulations, section 2180.1., and Title 17, California Code of Regulations, sections 60040, et seq.

(b) The following definitions also apply:

(1) “Administrative record” means all documents and records timely filed with the hearing office, pursuant to section 60075.3 and the time deadlines of these rules, including pleadings, petitions, and motions; all documents or records admitted into evidence or administratively noticed by the hearing officer; all official recordings or written transcripts of hearings conducted; and all orders or decisions issued by the hearing officer, executive officer, or the state board regarding the citation at issue; administrative record does not include any prohibited communications as defined in section 60075.14, and any settlement discussions or offers of settlement.

(2) “Citation” means an administrative action alleging one or more Class I violations as determined by the state board pursuant to section 60075.11.

(3) “Class I violation” means the type of violation for which issuance of a citation under this article is appropriate; it includes:

(A) All violations arising under Health and Safety Code sections 44011.6, et seq.; and

(B) Those violations that are less complex, less serious in nature as determined by one or more relevant factors listed in § 60075.11, and that the state board elects to address as “Class I violations.”

(4) “Complainant” means the state board, acting through any of its employees that have been authorized by the state board or its executive officers, to investigate, issue, and prosecute a citation under this article.

(5) “Consent Order” means an order entered by the hearing officer in accordance with the settlement agreement of the parties.

(6) “Default” means the failure of any party to take the steps necessary and required by these regulations to further the hearing towards resolution, resulting in a finding by the hearing officer of forfeiture of the cause of action against that party.

(7) “Discovery” means the limited right to exchange documents and taking of depositions, as provided in Subarticle 7.

(8)(i) "Hearing Office" is the office established by the state board to conduct administrative hearings pursuant to Health and Safety Code section 44011.6(m) (i) and 43028 to implement the provisions of these rules. The H hearing O office shall include at least one administrative law judge who shall act as a hearing officer.

(9)(ii) "Hearing Officer" is the person an administrative law judge appointed by the state board to conduct hearings pursuant to sections 44011.6 and 43028 of the Health and Safety Code and these rules. Only appointed administrative law judges shall act as hearing officers.

(10)(iii) "Party" includes the owner of a vehicle cited pursuant to Health and Safety Code section 44011.6(b) and Title 13, California Code of Regulations, section 2180 et seq., who requests a hearing pursuant to section 60075.10 of these rules, and the staff of the state board. The staff of the state board shall be a party whether or not it has appeared or participated in the proceeding. includes the complainant and respondent.

(11) “Penalty” means the civil penalty assessed against a respondent for one or more violations of the Act.

(12) “Proceeding” means any hearing, determination or other activity before the hearing officer that involves the parties to a citation or consideration of the citation.

(13) “Respondent” means any person named in the field citation as committing a Class I violation.

(14) "Settlement Agreement" means a written agreement executed by complainant and respondent, consisting of: (1) stipulations by the parties establishing subject matter jurisdiction; (2) an admission by respondent that it committed the violations as alleged in the field citation or a statement by respondent that it neither admits nor denies that it committed such violations; and (3) agreement as to the assessment of a civil penalty, with or without conditions.

~~(iv) "Staff of the state board" includes the inspector and any other employee of the state board whose primary duty is enforcing Health and Safety Code section 44011.6 and Title 13, California Code of Regulations, section 2180, et seq.~~

~~(v) "State board" has the same meaning specified in section 39053 of the Health and Safety Code. The term "state board" as used in these regulations includes the executive officer of the state board.~~

NOTE: Authority cited: Sections 39600, 39601, 43028, 43031(a) and 44011.6(m)(f), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections ~~39515~~ 43028, 43031(a) and 44011.6, Health and Safety Code.

### **§ 60075.3. Time Limits; Computation of Time.**

(a) All actions required pursuant to these rules shall be completed within the times specified in these rules herein, unless extended by the hearing officer upon a showing of good cause, and after consideration of prejudice to other parties. Requests for extensions of time for the filing of any pleading, letter, document, or other writing must be received in advance of the date on which the above is due to be filed and should contain sufficient facts to establish a reasonable basis for the relief requested.

(b) In computing the time within which a right may be exercised or an act ~~is to be~~ performed, ~~the first day shall be excluded~~ day of the event from which the designated right or act begins shall be excluded and the last day shall be included. If the last day ~~is not a working day~~ falls on a Saturday, Sunday, or a state holiday, time shall be extended to the next working day.

(c) In computing ~~the~~ time, the term "day" means calendar day.

(d) Unless otherwise indicated by proof of service, the mailing date shall be presumed to be the postmark date appearing on the envelope if first-class postage was prepaid and the envelope was properly addressed.

(e) Where service of any pleading, letter, document, or other writing is by mail, overnight delivery, or by facsimile transmission (fax), pursuant to section 60075.4(b), and if within a given number of days after such service, a right may be exercised, or an act is to be performed, the time

within which such right may be exercised or act performed is shall be extended as provided in section 60075.4(b), five days if the place of address is within the State of California, 10 days if the place of address is outside the State of California but within the United States, and 15 days if the place of address is outside the United States. Such extensions shall not apply to extend the time for requesting a hearing pursuant to section 60075.17 ~~10~~ of these rules.

(f) Papers received by the hearing office during regular business hours (8 a.m. to 5 p.m.) will be filed on that day. Papers received at times other than regular business hours will be filed on the next regular business day.

NOTE: Authority cited: Sections 39600, 39601, 43028, 43031(a) and 44011.6(m)(i), Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 43028, 43031(a) and 44011.6, Health and Safety Code.

#### **§ 60075.4. Service, Notice and Posting.**

(a) Except as otherwise provided, the original of every pleading, letter, document, or other writing served in a proceeding under these rules shall be filed with the ~~H~~hearing ~~O~~office.

(b) Unless otherwise required, service of any documents in the proceedings may be made by personal delivery; by United States first-class mail, by overnight delivery, or fax.

(1) Service is complete at the time of personal delivery.

(2) In the case of first-class mail, or overnight delivery the documents to be served must be deposited in a post office, mailbox or mail chute, or other like facility regularly maintained by the United States Postal Service, in a sealed envelope, properly addressed to the person on whom it is to be served at the address as last given by that person on any document filed in the present cause of action and served on the party making service, or otherwise at the place of residence of the person to be served. The service is complete at the time of the deposit, but any period of notice and any right or duty to do any act or to make any response within any period or date prescribed after service of the document shall be extended five days if the place of address is within the State of California, 10 days if the place of address is outside the State of California, but within the United States, and 15 days if the place of address is outside the United States.

(3) If served by overnight delivery, the document must be deposited in a box or other facility regularly maintained by the express service carrier, or delivered to an authorized courier or driver authorized by the express service carrier to receive documents, in an envelope or package designated by the express service carrier with delivery fees paid or provided for, addressed to the person on whom it is to be served, at the address as last given by the person on any document filed in the present cause of action and served on the party making service, or otherwise, at that

place of residence of the person to be served. The service is complete at the time of the deposit, but any period of notice and any right or duty to do any act or to make any response within any period or date prescribed after service of the document shall be extended two days.

(4) If served by fax, the document must be transmitted to a fax machine maintained by the person on whom it is served at the fax machine telephone number as last given by that person on any document which he or she has filed in the present cause of action and served on the party making the service. The service is complete at the time of the transmission, but any period of notice and any right or duty to do any act or to make any response within any period or date prescribed after service of the document shall be extended two days. Each such document filed shall be accompanied by a proof of service on each party or his or her representative of record on the date of service. Proof of service shall be made by one of the following means, as appropriate:

(i) Affidavit or declaration of service by personal delivery or mail; or

(ii) Written statement endorsed upon the document served and signed under penalty of perjury by the party making the statement.

(iii) Proof of service by the Hearing Office may be made by endorsement on the document served, setting forth the fact of service and the signature of the person making the service.

(c) The proof of service shall be made by declaration by a person over the age of 18 years and shall state whether such service was made personally, or by mail, overnight delivery, or by fax, and the date of service

(1) Where service is made by personal delivery, the declaration shall show the date and place of delivery and the name of the person to whom the documents were handed. Where the person making the service is unable to obtain the name of the person to whom the documents were handed, the person making the service may substitute a physical description for the name.

(2) Where service is made by first-class mail or overnight delivery, the declaration shall show the date and place of deposit in the mail, the name and address of the person served as shown on the mailing envelope and that the envelope was sealed and deposited in the mail with the postage fully prepaid.

(3) Where service is made by fax, the declaration shall show the method of service on each party, the date sent, and the fax number to which the document was sent.

(d) Service and notice to a party who has appeared through a representative shall be made upon such representative.

(e) The proof of service declaration shall be signed by the person making it and contain the following statement above the signature: "I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and this declaration was executed at (City, State) on (Date)." The name of the declarant shall be typed and signed below this statement. ~~Unless otherwise required, service may be made by personal delivery or by depositing the document in a post office, mailbox or mail chute, or other like facility regularly maintained by the United States Postal Service, sealed, properly addressed, with first-class postage prepaid.~~

(f) Proof of service made in accordance with the Code of Civil Procedure section 1013a complies with this regulation. ~~Service is complete at the time of personal delivery or mailing.~~

NOTE: Authority cited: Sections 39600, 39601, 43028, 43031(a) and 44011.6(m)(i), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 43028, 43031(a) and 44011.6, Health and Safety Code; Sections 11182 and 11184, Government Code; Sections 1013 and 1013a Code of Civil Procedure.

#### **§ 60075.5. Form of Pleadings.**

(a) Except as provided in this section, or by order of the hearing officer, there are no specific requirements as to the form of documents filed in a proceeding under these rules.

(b) The original of any pleading, letter, document, or other writing (other than an exhibit) shall be signed by the filing party or ~~his or her~~ its representative. The signature constitutes a representation by the signer that ~~he or she~~ it has read the document, that to the best of ~~his or her~~ its knowledge, information and belief, the statements made therein are true, and that it is has not filed the document for the purpose of delay.

(c) The initial document filed by any person shall indicate his or her status (as a party or representative of the ~~for specified~~ party) and shall contain his or her name, address and telephone number. Any changes in this information shall be communicated promptly to the ~~H~~hearing ~~O~~ffice and all parties to the proceeding. A party who fails to furnish such information and any changes to it ~~thereto~~ shall be deemed to have waived his or her right to notice and service under these rules.

NOTE: Authority cited: Sections 39600, 39601, 43028, 43031(a) and 44011.6(m)(i), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 43028, 43031(a) and 44011.6, Health and Safety Code.

#### **§ 60075.6. Limitations on Written Legal Arguments or Statements**

(a) Any written legal argument or statement submitted to the hearing officer by a participant in an action under this part shall be double spaced and typed in a font size 12 point or larger. Except as otherwise provided by this part, further limited by the hearing officer, or otherwise authorized by the hearing officer for good cause shown, no written legal argument, exclusive of any supporting documentation, may exceed:

(1) 12 pages, for arguments in support of or opposition to motions; and

(2) Three pages, for reply arguments.

Note: Authority cited: Sections 39600, 39601, 43028, 43031(a) and 44011.6(m), Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 43105, 43031(a) and 43028, Health and Safety Code.

#### **§ 60075.7 6. Records of the State Board.**

Except where public disclosure of information or exhibits is restricted by law, records of the state board are public records and are available to the public pursuant to section 91000, et seq., Title 17, California Code of Regulations.

NOTE: Authority cited: Sections 39600, 39601, 43028, 43031(a) and 44011.6(m)(f), Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 43028, 43031(a) and 44011.6, Health and Safety Code; Section 6250, et seq., Government Code.

#### **§ 60075.8. Representation.**

(a) A party may appear in person or through a representative, who is not required to be an attorney at law. The right to representation is at the party's own expense. Following notification that a party is represented by a person other than him or herself, all further communications regarding the proceedings shall be directed to that representative.

(b) A representative of a party shall be deemed to control all matters respecting the interest of such party in the proceeding. Persons who appear as representatives shall not engage in unethical conduct or intentionally fail to observe the provisions of these rules and the proper instructions or orders of the hearing officer.

(c) A representative may withdraw an appearance by filing a written notice of withdrawal with the hearing office and by serving a copy on all parties.

NOTE: Authority cited: Sections 39600, 39601, 43028, 43031(a) and 44011.6(m), Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 43028, 43031(a) and 44011.6, Health and Safety Code.

**§ 60075.9. Interpreters and Other Forms of Accommodation.**

(a) In proceedings where a party, a party's representative, or a party's expected witness requires an interpreter for any language, including sign language, or any other form of reasonable accommodation that party shall be responsible for notifying the hearing office as soon as the requirement is known, but no later than 10 days prior to the first day of hearing. The hearing officer may allow later notification for good cause. The hearing office shall be responsible for securing the interpreter, and for providing reasonable accommodation.

(b) The cost of interpreter services shall be paid by the state board if the hearing officer so directs. In determining who should pay the cost of the interpreter, the hearing officer shall base the decision on equitable considerations, including, the ability of the party in need of the interpreter to pay the cost.

Note: Authority cited: Sections 39600, 39601, 43028 and 43031(a), Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 43105, 43028 and 43031(a), Health and Safety Code; Sections 11435.25, 11435.30 and 11435.55, Government Code; Section 751, Evidence Code.

**§ 60075.10. Motions.**

(a) Any motion or request for action by the hearing officer relating to any proceeding pending before him or her filed by any party, except those made orally on the record at the hearing, shall be in writing and shall be directed to the hearing officer, with written notice and proof of service to all parties. The caption of each motion shall contain the title and docket number of the proceeding and a clear and plain statement of the relief sought, together with the grounds therefore.

(b) Except as otherwise provided by statute or these regulations, or as ordered by the hearing officer, a motion shall be made and filed at least 15 days before the date set for the motion to be heard or the commencement of the hearing on the merits. Any response to the motion shall be filed and served no later than five days before the motion is scheduled to be heard or as ordered by the hearing officer.

(c) The hearing office shall set the time and place for the hearing of the motion. The hearing shall occur as soon as practicable.

(d) Except as otherwise provided by statute or these regulations, the hearing officer may decide a motion filed pursuant to this section without oral argument. Any party may request oral argument at the time of the filing of the motion or the response. If the hearing officer orders oral argument the party requesting oral argument, or any party directed to do so by the hearing officer, shall serve written notice on all parties of the date, time and place of the oral argument. The hearing officer may direct that oral argument be made by telephone conference call or other electronic means. The hearing officer may order that the proceedings be recorded.

(e) The hearing officer shall issue a written order deciding any motion, unless the motion is made during the course of the hearing on the merits while on the record. The hearing officer may request that the prevailing party prepare a proposed order.

NOTE: Authority cited: Sections 39600, 39601, 43028, 43031(a) and 44011.6(m), Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 43028, 43031(a) and 44011.6, Health and Safety Code.

## **Subarticle 2. Issuance and Service of Citations**

### **§ 60075.11. Determination of Class I Violations.**

(a) A Class I violation includes:

(1) All violations arising pursuant to Health and Safety Code §§ 44011.6, et seq.

(2) Violations of the statutes and regulations pertaining to the motor vehicle fuel requirements and standards that the state board has determined, based upon its enforcement discretion, to be of a nature that is clear cut, and less complex and serious, in terms of size, scope, and harm to the public and environment.

(b) In determining whether violations are Class I violations under section (a)(2), the state board shall consider factors, including, but not limited to:

(1) The discernability of the violation;

(2) The potential risk of injury to the public and environmental harm from such a violation;

(3) Whether the violation is a single violation or has occurred in tandem with other violations;

(4) The frequency and duration of the violation;

(5) The time, effort, and expense required to correct the violation;

(6) The cooperation of the respondent in detecting and correcting the violation;

(7) The compliance history of the respondent.

(8) Other factors as appropriate.

(c) The maximum civil penalty that may be proposed for each Class I violation may not exceed \$5,000 per day of violation and the maximum cumulative penalty that may be proposed in any single citation may not exceed \$15,000. See section 60075.39.

NOTE: Authority cited: Sections 39600, 39601, 43028, 43031(a) and 44011.6(m), Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 43028, 43031(a) and 44011.6, Health and Safety Code.

#### **§ 60075.12. Issuance and Service of Citations.**

(a) The complainant may issue a citation to any person for Class I violations as defined in section 60075.11.

(b) A “Citation” shall include the following information:

(1) The names of the alleged respondents;

(2).A concise, but reasonably specific statement of the alleged violations;

(3) A proposed penalty for the alleged violations that is to be assessed against the respondent as authorized by applicable law;

(4) Reference to these procedures, and notification that a copy of the procedures are available from the ARB hearing office, the address and phone number of which shall be designated, and that Chapter 5 (commencing with section 11500) of the Government Code is not applicable to these proceedings);

(5) Written notice to respondent that he or she:

(A) May respond to the allegations of the citation and request a hearing. It shall also inform the respondent of the consequences of failing to respond by the applicable deadline;

(B) Has the right to represent him or herself or to retain a representative, who is not required to be an attorney, at one's own expense; and

(C) If necessary, has the right to an interpreter.

(6) The address of the office issuing the complaint; the address to which payment of the proposed penalty may be sent; and the address of the hearing office to whom a request for a hearing shall be submitted.

NOTE: Authority cited: Sections 39600, 39601, 43028, 43031(a) and 44011.6(m), Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 43028, 43031(a) and 44011.6, Health and Safety Code.

### **Subarticle ~~3 2~~ Hearing Officers**

#### **§ 60075.13 7. Authority of Hearing Officers; Disqualification.**

(a) In any matter subject to hearing pursuant to these rules, the hearing officer shall have the authority to do any act and take all measures necessary for the maintenance of order and for the efficient, fair and impartial adjudication of issues arising in proceedings governed by these rules, including, but not limited to, authority to hold a prehearing and settlement conferences; conduct hearings to determine all issues of and ascertain facts; and law presented; to rule upon motions, requests and offers of proof, dispose of procedural requests, and issue all necessary orders; administer oaths and affirmations and take affidavits or declarations; to issue subpoenas and subpoenas duces tecum for the attendance of a person and production of testimony, books, documents, or other things; to compel the attendance of a person residing anywhere in the state; to rule on objections, privileges, defenses, and the receipt of relevant and material evidence; to call and examine a party or witness and introduce into the hearing record documentary or other evidence; to request a party at any time to state the respective position or supporting theory concerning any fact or issues in the proceeding; to certify official acts; to extend the submittal date of any proceeding; to hear and determine all issues of fact and law presented and to issue such interlocutory and final orders, findings, and decisions as may be necessary for the full adjudication of the matter.

(b) The hearing officer or the executive officer, on a request for reconsideration, shall disqualify himself or herself and withdraw from any case in which he or she cannot accord a fair and impartial hearing. Any party may request the disqualification of a hearing officer by filing an affidavit or declaration under penalty of perjury. A request for disqualification of the hearing officer must be made no later than five days prior to the commencement to the first day of hearing on the merits of the case. A request for disqualification of the executive officer must be included in the request for reconsideration. The affidavit or declaration must state prior to the taking of

~~evidence at a hearing, stating with particularity the grounds upon which it is claimed that a fair and impartial hearing cannot be accorded. The issue shall be respectively determined by either the hearing officer or the executive officer against whom the request for disqualification has been filed.~~

NOTE: Authority cited: Sections 39600, 39601, 43028, 43031(a) and 44011.6(m)(i), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 43028, 43031(a) and 44011.6, Health and Safety Code; Sections 11181-11182, 11425.30 and 11512, Government Code.

#### **~~60075.8. Authority of Executive Officer and General Counsel.~~**

~~The executive officer and the general counsel of the state board shall have the authority to issue subpoenas and subpoenas duces tecum for the attendance of a person and the production of testimony, books, documents, or other things; to compel the attendance of a person residing anywhere in the State; to certify official acts; to grant withdrawal, disposition or amendment; and to issue such other orders as may be necessary for the full adjudication of the matter.~~

~~NOTE: Authority cited: Sections 39600, 39601 and 44011.6(i), Health and Safety Code. Reference: Section 44011.6, Health and Safety Code; Section 11181 and 11182, Government Code.~~

#### **Subarticle 4. Ex Parte Communication.**

#### **~~§ 60075.9. Ex Parte Communication.~~**

~~(a) No pleading, letter, document, or other writing shall be filed in a proceeding under these rules by a party unless service of a copy thereof together with any exhibit or attachment is made on all other parties to a proceeding. Service shall be in a manner as prescribed in section 60075.4.~~

~~(b) No action will be taken by the hearing officer on any communication, oral or written, that is out of the presence of or not served on any other party, which concerns a proceeding and which may be expected to affect the interest of another party to the proceeding. The hearing officer shall identify an ex parte communication and retain the document, if any, until all parties have been served and had a reasonable opportunity to respond. The hearing officer shall notify the moving party that no action may be taken until the moving party has served all other parties to the proceeding.~~

~~NOTE: Authority cited: Sections 39600, 39601 and 44011.6(i), Health and Safety Code. Reference: Section 44011.6, Health and Safety Code.~~

#### **§ 60075.14. Prohibited Communications.**

(a) Except as otherwise provided in this section, while the proceeding is pending, the hearing officer shall not participate in any communications with any party, representative of a party, or any person who has a direct or indirect interest in the outcome of the proceeding about the subject matter or merits of the case at issue, without notice and opportunity of all parties, to participate in communication except a party that has been determined to be in default pursuant to §60075.38.

(b) No pleading, letter, document, or other writing shall be filed in a proceeding under these rules by a party unless service of a copy thereof together with any exhibit or attachment is made on all other parties to a proceeding. Service shall be in a manner as prescribed in section 60075.4.

(c) For the purpose of this section, a proceeding is pending from the time that a request for hearing is filed.

(d) Communications prohibited under paragraph (a) do not include communications concerning matters of procedure or practice, including requests for continuances that are not in controversy. It also does not prohibit communications between a party and the hearing officer when the opposing party has had a default entered pursuant to § 60075.38.

(e) A communication that would otherwise be prohibited by this section from an employee of the state board to the hearing officer is permissible if such employee has not served as an investigator, prosecutor, or advocate in the proceeding or its preadjudicative stage, and the purpose of the communication is to assist and advise the hearing officer in the initial determination of whether a document is a confidential business record (i.e., trade secrets) and reviewing the evidence in the record and drafting a decision or order. In carrying out these functions, the employee of the state board shall not furnish, augment, diminish, or modify the evidence in the record.

NOTE: Authority cited: Sections 39600, 39601, 43028 and 43031(a), Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 43105, 43028 and 43031(a), Health and Safety Code; Sections 11430.70 - 11430.80, Government Code.

#### **§ 60075.15. Disclosure of Communication.**

(a) If, while the proceeding is pending, but before serving as hearing officer, the hearing officer receives a communication of a type that would be in violation of this subarticle if received while serving as hearing officer, he or she shall, promptly after starting to serve, disclose the content of the communication on the record and give all parties an opportunity to address it as provided below.

(b) If a hearing officer receives a communication in violation of this article, the hearing officer shall make all of the following a part of the record in the proceeding:

(1) If the communication is written, the writing and any written response of the hearing officer to the communication; and

(2) If the communication is oral, a memorandum stating the substance of the communication, any response made by the hearing officer, and the identity of each person from whom the hearing officer received the communication.

(c) The hearing officer shall notify all parties that a communication described in this section has been made a part of the record.

(d) If a party requests an opportunity to address the communication within 10 days after receipt of notice of the communication:

(1) The party shall be allowed to comment on the communication; and

(2) The hearing officer has discretion to allow the party to present evidence concerning the subject of the communication, including discretion to reopen a hearing that hearing having been concluded.

(e) Receipt of ex parte communications may be cause for disqualification of the hearing officer.

NOTE: Authority cited: Sections 39600, 39601, 43028 and 43031(a), Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 43105, 43028 and 43031(a), Health and Safety Code; Sections 11340.1 - 11340.5, Government Code.

#### **§ 60075.16. Applicability to Executive Officer.**

(a) The provision of Subarticle 4 governing ex parte communications to the hearing officer also governs ex parte communications with the executive officer on matters that may come before him or her pursuant to Subarticle 11.

(b) Except as provided in Subarticle 11 while a proceeding is pending, the hearing officer shall have no communication with the executive officer on a matter that is under reconsideration.

NOTE: Authority cited: Sections 39600, 39601, 43028 and 43031(a), Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 43105, 43028 and 43031(a), Health and Safety Code; Sections 11430.70 - 11430.80, Government Code.

### Subarticle 5 3. Initiating Proceeding to Contest a Citation

#### § 60075.17 ~~10~~. Filing a Request for Hearing.

(a) Upon receiving a citation the respondent ~~The owner of a motor vehicle cited pursuant to section 2180 et seq., Title 13, California Code of Regulations~~ may:

(1) Initiate proceedings under these rules by filing a written request for hearing to contest a citation issued by the staff of the state board; or

(2) Pay the penalty demanded in the citation.

(b) For citations arising under section 44011.6 of the Health and Safety Code, the request for hearing shall be filed within 45 30 days of the respondent's owner's receipt of the citation by personal delivery or certified mail.

(c) For all other citations issued by the state board, the request for hearing shall be filed within 30 days of the respondent's receipt of the citation by personal delivery or certified mail.

(d) The hearing officer may extend the applicable filing period set forth in subparagraphs (b) and (c) for good cause.

(e) If the respondent vehicle owner fails to notify the Hhearing Ooffice of his or her intent to contest the citation within this the applicable period set forth in subparagraphs (b) and (c), and if the citation penalty amount has not been paid in full, the citation becomes a final order not subject to review by any court or agency.

(f)(e) The request for hearing shall be deemed filed on the date a communication the notice indicating a desire to contest the issued citation pursuant to section 44011.6(b) is delivered or mailed to, or if the date of delivery or mailing is not known, received by the Hhearing Ooffice. No particular format is necessary to institute the proceeding; however, the request shall include all of the information specified in section 60075.18 11 of these rules.

(g)(f) If the communication initiating the proceeding does not include the information required pursuant to section 60075.18 11, the Hhearing Ooffice shall immediately acknowledge receipt of the communication indicating the desire to request a hearing and shall notify the respondent owner of the deficiencies in the submission which must be corrected before the request for hearing may be filed and docketed. The respondent owner shall have 10 days from the date of mailing of the notice of deficiencies to submit a complete request for hearing; if the deficiencies are not corrected in the time provided the citation becomes final.

~~(h)(d)~~ Upon timely receipt of a complete request for hearing, the ~~H~~hearing ~~O~~ffice shall assign a docket number to the proceeding, and shall notify the parties that the request for hearing has been filed and docketed.

(i) Upon a showing of good cause, the hearing officer may allow the respondent to amend the request for hearing after the deadline for filing has passed.

NOTE: Authority cited: Sections 39600, 39601, 43028, 43031(a) and 44011.6(m)(i), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 43028, 43031(a) and 44011.6, Health and Safety Code.

#### **§ 60075.18 ~~11~~. Form of Request for Hearing.**

(a) The request for hearing shall be signed by the respondent or its designated representative and contain at least the following information: a reference to the citation being contested, including citation number and date of issuance; date of respondent's ~~owner's~~ receipt of the citation by personal delivery or certified mail; correct business address; a statement of the circumstances or arguments which are the basis of the request for hearing; identification of the facts the owner intends to place at issue; if applicable, the name and address of the designated representative; and identification of any other issues relating to the citation to be resolved in the proceeding.

(b) A separate request for hearing shall be filed for each citation contested.

NOTE: Authority cited: Sections 39600, 39601, 43028, 43031(a) and 44011.6(m)(i), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 43028, 43031(a) and 44011.6, Health and Safety Code.

#### **§ 60075.19 ~~12~~. Issues for Hearing.**

(a) The issues for hearing shall be limited to those raised by the citation and the docketed request for hearing.

(b) If a citation is classified as a repeat violation pursuant to section 2185, Title 13, California Code of Regulations, the validity of the earlier citation established by failure to request a hearing or the entry of a final disposition by the state board shall not be ~~in~~ at issue. However, if the citation imposes a penalty pursuant to section 2185(a)(3), the staff of the state board shall be required to demonstrate the existence of the prior citation or citations.

NOTE: Authority cited: Sections 39600, 39601, 43028, 43031(a) and 44011.6(m)(i), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 43028, 43031(a) and 44011.6, Health and Safety Code.

**§ 60075.20 13. Effect of Filing a Request for Hearing.**

(a) The requirements to immediately correct deficiencies specified in a citation (~~issued under~~ section 44011.6(b)) and to pay a civil penalty within 45 days of receipt of a citation (Title 13, California Code of Regulations, section 2185) shall be stayed on timely receipt of a ~~R~~request for ~~H~~hearing until a final decision or order has been issued pursuant to section 60075.44 ~~40~~ of these rules.

(b) For all other citations of noncompliance, if a cease and desist order has been issued, the hearing officer shall issue a stay pending issuance of a final decision, unless the hearing officer finds that the adverse effects of a stay on the public health, safety and welfare outweigh the harm to those persons directly affected by the lack of a stay. The hearing officer may conduct a hearing or request such submissions by the parties as necessary to obtain information to make a determination on this issue.

NOTE: Authority cited: Sections 39600, 39601, 43028, 43031(a) and 44011.6(m)(i), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 43028, 43031(a) and 44011.6, Health and Safety Code.

**§ 60075.21 14. Response.**

Within 20 days after receipt of notice of the filing of a request for hearing from the ~~H~~hearing ~~O~~ffice, ~~the staff of the complainant state board~~ shall file with the ~~H~~hearing ~~O~~ffice, and serve upon the respondent owner, a response to the request for hearing if ordered by the hearing officer in the notice of filing required pursuant to section 60075.17 ~~10~~ (d) of these rules. The response, if required, shall contain the reasons and facts in support of the issuance of the citation and any other information specified in the notice of filing.

NOTE: Authority cited: Sections 39600, 39601, 43028, 43031(a) and 44011.6(m)(i), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 43028, 43031(a) and 44011.6, Health and Safety Code.

**Subarticle 6 4. Resolution of Proceeding Without Hearing**

**§ 60075.22 15. Withdrawal of Request for Hearing.**

(a) The request for hearing may be withdrawn by the respondent owner by written request at any time before a decision is issued or by oral motion on the hearing record. The ~~H~~hearing ~~O~~fficer shall grant such withdrawal by order or decision served on the parties.

(b) ~~The order or decision granting the motion to withdraw is a final order effectively reinstates the citation. If the time period for filing a request for hearing has passed, the citation shall be deemed a final order not subject to review by the state board or any court. and not subject to review by any court or agency 30 days after service on the parties.~~

NOTE: Authority cited: Sections 39600, 39601, 43028, 43031(a) and 44011.6(m)(i), Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 43028, 43031(a) and 44011.6, Health and Safety Code.

#### **§ 60075.23 16. Withdrawal of Citation.**

(a) ~~At anytime before the hearing officer issues a decision on the merits of the citation, the complainant~~ The staff of the state board may withdraw a the citation by written notice at any time or by oral motion on the hearing record.

(b) If a notice of withdrawal is issued prior to the hearing, the complainant ~~staff of the state board~~ shall serve a copy of the notice of withdrawal on each party and on any authorized representatives.

(c) The notice of withdrawal or motion to withdraw a citation shall be accepted by the hearing officer and is a final order. A citation which has been withdrawn may not be reinstituted.

NOTE: Authority cited: Sections 39600, 39601, 43028, 43031(a) and 44011.6(m)(i), Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 43028, 43031(a) and 44011.6, Health and Safety Code.

#### **§ 60075.24. Settlement Agreements and Consent Orders.**

(a) At any time before a final decision of the hearing officer, the complainant and the respondent may settle an action, in whole or in part, by agreeing upon a civil penalty, with or without conditions.

(b) The parties may request the assistance of the hearing office in their attempts to settle the matters at issue. Upon receiving such a request, the hearing office may assign a settlement hearing officer, who is not the same hearing officer that has been assigned, to hear the merits of the case, unless the parties specifically request in writing the assignment of the latter hearing officer.

(c) The parties shall memorialize any agreement in writing.

(d) The hearing officer assigned to hear the merits of the case, shall thereafter enter a consent order in accordance with the terms of the settlement agreement. Such consent order is not subject to further review by the agency or a court.

(e) If the filing of the consent order pursuant to paragraph (d) of this section or the settlement in the petition for review proceeding does not wholly conclude the action, the hearing officer assigned to hear the merits of the case shall promptly inform the parties of the schedule of the remaining proceedings.

(f) Unless the parties have otherwise consented to use the hearing officer assigned to hear the merits of the case in settlement discussions, settlement discussions or offers of compromise regarding unresolved issues shall not be discussed with that hearing officer. Settlement discussions or offers of compromise shall also not be made part of the record of the proceedings.

NOTE: Authority cited: Sections 39600, 39601, 43028, 43031(a) and 44011.6(m), Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 43028, 43031(a) and 44011.6, Health and Safety Code; Section 11415.60, Government Code.

#### **§ 60075.25 Motions for Summary Determination of Issues.**

(a) Any party may file a motion for summary judgment or summary adjudication of the issues. Such motions shall include supporting legal argument and, where necessary, affidavits showing that there is no genuine issue of material fact for determination regarding the identified issues. A party opposing such a motion shall show by affidavit or other documentation that a genuine issue of material fact as to the issues raised exists. After reviewing the motion and response of the parties, the administrative record, and any arguments of the parties, the hearing officer shall determine whether a genuine issue of material fact as to the issues exists and whether a party is entitled to judgment as to liability as a matter of law.

(b) If, upon considering a motion under subparagraph (c), the hearing officer determines that a party is entitled to summary judgment as to liability as a matter of law, the hearing officer shall issue a written order or decision that sets forth necessary findings of fact and conclusions of law regarding all matters that were at issue. If the decision finds liability, the hearing officer shall follow the penalty assessment criteria set forth in section 60075.39.

(c) Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the hearing officer may deny the motion, or grant a continuance to permit affidavits to be obtained, or to permit discovery as provided under these procedures.

(d) The hearing officer shall deny a request for summary determination of liability if he or she finds the administrative record, including any evidence presented by the parties as part of this motion, present a genuine issue of material fact. If the hearing officer denies a request for summary determination, or denies such a request in part, the hearing officer shall promptly issue to each party a written ruling as to the existence of a genuine issue of material fact as to liability and the reasons for the ruling. The matter shall continue to be set for hearing on all issues for which a genuine issue of material fact exists.

NOTE: Authority cited: Sections 39600, 39601, 43028, 43031(a) and 44011.6(m), Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 43028, 43031(a) and 44011.6, Health and Safety Code.

**~~§ 60075.17. Disposition of Issues:~~**

~~(a) Upon a showing of good cause, the hearing officer may dispose of the issues for hearing by granting a written motion of the parties made at any time, or an oral motion of the party made on the hearing record:~~

~~(b) The hearing officer shall grant such disposition by order or decision served on the parties:~~

~~(c) Unless taken under reconsideration, the order or decision granting the disposition is a final order and not subject to review by any court or agency 60 days after service by mail on the parties:~~

~~NOTE: Authority cited: Sections 39600, 39601, and 44011.6(i), Health and Safety Code. Reference: Section 44011.6, Health and Safety Code; Sections 11181 and 11182, Government Code.~~

**Subarticle 7 5. Motions and Discovery, and Subpoenas and Subpoenas Duces Tecum**

**~~§ 60075.18 Motions:~~**

~~(a) Any motion or request for action by the hearing officer relating to any proceeding pending before him or her filed by any party, except those made orally on the record at the hearing, shall be in writing and shall be directed to the hearing officer. The caption of each motion shall contain the title and docket number of the proceeding and a clear and plain statement of the relief sought, together with the grounds therefor:~~

~~(b) Any party upon whom a motion or request is served shall have 10 working days from service of the motion or request to file a response:~~

~~NOTE: Authority cited: Sections 39600, 39601, and 44011.6(i), Health and Safety Code.  
Reference: Section 44011.6, Health and Safety Code.~~

**§ 60075.26. Discovery**

(a) Exclusivity of Discovery Provisions.

The provisions of this section provide the exclusive right to, and method of, discovery as to any proceeding governed by this chapter.

(b) Document Exchange.

(1) Each party may request within 30 days of respondent's filing of the request for hearing that the opposing party provide a copy of each document that the opposing party intends to introduce at the hearing.

(2) In addition, the complainant may request of a respondent the following information in writing who contends that it is unable to pay the penalty:

(A) Financial information in support of such claim, including, but not limited to, complete copies of its federal income tax returns for the previous three years; and

(B) The respondent's net profits, delayed or avoided costs, or any other form of economic benefit resulting from any activity or failure to act by the respondent which is alleged in the field citation.

(3) The parties shall exchange the requested information at a time mutually agreed to by the parties, or if no agreement has been reached, no later than 30 days after a request has been made. Documents shall be served upon the requesting party pursuant to section 60075.4(b).

(4) Unless other arrangements are made, the party making the request shall pay the reasonable costs of copying the requested materials.

(5) A party claiming that certain writings or things are privileged against disclosure shall serve on the requesting party a written statement setting forth what matters are claimed to be privileged and the reasons therefore.

**§60075.19. Identity of Witnesses.**

(c) Identity of Witnesses.

(1) No later than 10 days before the scheduled hearing date, the parties shall submit to the Hearing Office and serve upon the other parties, a list of the names, addresses and qualifications of proposed witnesses and a brief summary of the testimony to be presented by each witness.

(2) The hearing officer may prohibit any party from presenting any witness that has not been included on that party's witness list as required under paragraph (c) of this section.

NOTE: Authority cited: Sections 39600, 39601, 43028 and 44011.6(m)(i), Health and Safety Code. Reference: Section and 44011.6, Health and Safety Code.

**~~§ 60075.20. Access to Documents.~~**

~~(a) After initiation of a proceeding, a party, upon written request made to another party is entitled, prior to the hearing, to inspect and make a copy of any document, thing, statement or other writing relevant to the issues for hearing which is in the control of the other party and which is relevant and would be admissible in evidence, including but not limited to, any statements of parties or witnesses relating to the subject matter of the proceeding, all writings or things which the party then proposes to offer in evidence, and any inspection or investigative reports prepared by or on behalf of any party.~~

~~(b) Parties shall arrange a mutually convenient time for inspecting and copying the writings or other statements. Unless other arrangements are made, the party requesting the writings must pay for the copying.~~

~~(c) A party claiming that certain writings or things are privileged against disclosure shall serve on the requesting party a written statement setting forth what matters are claimed to be privileged and the reasons therefore.~~

NOTE: Authority cited: Sections 39600, 39601 and 44011.6(i), Health and Safety Code. Reference: Section 44011.6, Health and Safety Code.

**~~§ 60075.21. Subpoena and Subpoena Duces Tecum.~~**

~~(a) Before the hearing has commenced, the hearing officer assigned to a proceeding, general counsel or executive officer shall issue a subpoena and subpoena duces tecum at the request of a party for attendance of a person or production of a document or thing at the hearing. After the hearing has commenced, the hearing officer may issue a subpoena and subpoena duces tecum.~~

~~(b) Subpoenas and subpoenas duces tecum shall be issued in accordance with section 11510 of the Government Code.~~

~~(c) Upon timely motion of a party or witness, or upon his or her own motion, after notice to the parties and an opportunity to be heard, upon a showing of good cause, the hearing officer may order the quashing of a subpoena or subpoena duces tecum entirely, may modify it, or may direct compliance with it upon other terms or conditions. In addition, the hearing officer may make any other order as may be appropriate to protect a party or witness from unreasonable or oppressive demands.~~

~~NOTE: Authority cited: Sections 39600, 39601 and 44011.6(i), Health and Safety Code.  
Reference: Section 44011.6, Health and Safety Code; Sections 11185, 11191 and 11510;  
Government Code.~~

**~~§ 60075.22. Depositions.~~**

(d) Depositions.

~~The testimony of any witness necessary to the full adjudication of the issues who is unable to or cannot be compelled to attend the hearing may be obtained by deposition in accordance with the provisions of section 11511 of the Government Code.~~

(1) Unless otherwise stipulated to by the parties, depositions shall be limited to the following:

(A) A party may petition the hearing office to request that it be allowed to take the testimony of a material witness who is either unable to attend or cannot be compelled to attend a hearing on the merits may be obtained by deposition in the manner prescribed by law for depositions in civil actions;

(B) The petition shall set forth the nature of the pending proceeding; the name and address of the witness whose testimony is desired; a showing of the materiality of the testimony; a showing that the witness will be unable or cannot be compelled to attend; and shall request an order requiring the witness to appear and testify before an officer named in the petition for that purpose;

(C) The petitioner shall serve notice of the deposition and a copy of the petition on the other parties at least 10 days before the date set for the deposition.

(2) Where the witness resides outside of the state and where the hearing officer has ordered the taking of the testimony by deposition, the hearing officer shall obtain an order of court to that effect by filing a petition in the superior court in Sacramento County. The proceedings for such a hearing shall be in accordance with the provisions of Government Code section 11189.

(e) Protective Orders:

(1) Upon motion by a party or by the person from whom discovery is sought, or by the hearing officer on his or her own motion, the hearing officer may enter a protective order with respect to this material.

(2) Prior to granting a protective order, it must be established by the moving party that the information sought to be protected is entitled to be treated as a trade secret or is otherwise confidential. A party or person seeking a protective order shall have the opportunity to be heard on all issues relevant to preserving the record's confidentiality, including, but not limited to, the following:

(A) The appropriate scope and terms of any governing protective order;

(B) The terms under which the record may be placed in evidence or otherwise used at a hearing; and

(C) The disposition of the record and any copies thereof after all relevant administrative and judicial proceedings have concluded.

(3) A party or person seeking a protective order may be permitted to make all or part of the required showing in a meeting closed to the public. The hearing officer shall have discretion to limit attendance at any closed meeting to the hearing officer and the person or party seeking the protective order.

(4) If granted, the protective order may order that the trade secret information not be disclosed or that it be disclosed only to specified persons, or in a specified way. Disclosure may be limited to counsel for the parties who shall not disclose such information to the parties themselves. Disclosure to specified persons shall be conditioned on execution of sworn statements that no disclosure of the information will be made to persons not entitled to receive it under the terms of the protective order.

(5) The protective order shall contain terms governing the treatment of the information which are appropriate under the circumstances to prevent disclosure outside the hearing; the order may require that the material be kept under seal and filed separately from other evidence and exhibits in the hearing.

(6) Any party subject to the terms and conditions of any protective order, desiring to make use of any documents or testimony covered by the protective order, shall file a motion to the hearing officer and set forth justification for the request. The motion shall be granted upon a

demonstration of good cause that the information is relevant and has significant probative value on a disputed issue of material fact in issue. In granting the motion, the hearing officer shall enter an order protecting the rights of the affected persons and parties, who have claimed that the information is confidential, by preventing any unnecessary disclosure of the information. The hearing officer may require that the information be presented in a closed meeting, with attendance limited, as necessary and practicable, to specified representatives of the parties.

(7) The hearing office shall make a record of all closed meetings that are ordered under this section. The record shall be sealed and made available, upon appropriate order, to the executive officer, on reconsideration, or to the court on review.

(8) If the hearing officer denies a motion for protective order or grants a protective order only in part, the order shall not become effective until 10 days after the date the order is served. In the interim, a party to the proceeding or third-party holder of the asserted confidential information adversely affected by the order may seek appropriate interlocutory relief in a court of competent jurisdiction.

NOTE: Authority cited: Sections 39600, 39601, 43028, 43031(a) and 44011.6(m)(i), Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 43028, 43031(a) and 44011.6, Health and Safety Code; Sections 11185, 11191 and 11511, Government Code.

#### **§ 60075.27 25. Proceeding to Compel Discovery.**

~~(a) The hearing officer may, after notice, upon request of any party or on his or her own motion, order a party, or his or her representative, to produce testimony, documents or other nonprivileged evidence in compliance with the provisions of these rules regarding discovery. If after receipt of a order directing compliance with the provisions of these rules regarding discovery, a party fails without good cause to comply with the order, the hearing officer may draw adverse inferences against that party.~~

~~(b) Alternatively, a party claiming a request for discovery pursuant to these rules has not been complied with may take action to compel discovery in accordance with the provisions of section 11507.7 of the Government Code.~~

~~(i) The hearing shall be stayed during the pendency of the proceedings before the superior court or court of appeal only if the court in which the action is pending issues an order to that effect and a copy of the order is immediately filed with the hearing officer.~~

(a) Any party claiming that its request for discovery pursuant to this section has not been complied with or that the opposing party has failed to comply with a stipulated agreement to provide discovery may serve and file with the hearing officer a motion to compel the party who

has refused or failed to produce the requested or stipulated discovery to comply. The motion shall state facts showing the party has failed or refused to comply with a discovery request or stipulation, a description of the matters sought to be discovered, the reason or reasons why the matter is discoverable, that a reasonable and good faith attempt to contact the noncomplying party for an informal resolution of the issue has been made, and the grounds of the noncomplying party's refusal so far as known to the moving party.

(b) The motion shall be filed within 15 days after the date the requested materials were to be made available for inspection and copying or the date a deposition was scheduled to take place and served upon the party who has failed or refused to provide discovery.

(c) The hearing on the motion to compel discovery shall be held within 15 days after the motion is filed, or a later time that the hearing officer may on his or her own motion for good cause determine. The party who has refused or failed to provide discovery shall have the right to serve and file a written answer or other response which shall be due at the hearing office and personally served on all parties at least three days prior to the date set for hearing.

(d) Where the matter sought to be discovered is under the custody or control of the party who has refused or failed to provide discovery and that party asserts that the matter is not a discoverable matter under this section, or is privileged against disclosure, the hearing officer may order that the party in custody lodge with the hearing office the matters identified in subdivision (b) of section 915 of the Evidence Code and the hearing officer shall examine the matters in accordance with those provisions.

(e) The hearing officer shall decide the case on the matters examined in a closed meeting, the papers filed by the parties, and such oral argument and additional evidence as the hearing officer may allow.

(f) Unless otherwise stipulated by the parties, the hearing officer shall no later than 15 days after the hearing make its order denying or granting the motion. The order shall be in writing setting forth the matters the moving party is entitled to discover. The hearing office shall serve a copy of the order by mail upon the parties. Where the order grants the motion in whole or in part, the order shall not become effective until 10 days after the date the order is served. Where the order denies relief to the moving party, the order shall be effective on the date it is served.

(g) If after receipt of an order directing compliance with the provisions of these rules regarding discovery, a party fails, without good cause, to comply with the order, the hearing officer may draw adverse inferences against that party and may prevent that party from introducing any evidence that had been requested and not produced during discovery into the administrative record.

NOTE: Authority cited: Sections 39600, 39601, 43028, 43031(a) and 44011.6(m)(f), Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 43028, 43031(a) and 44011.6, Health and Safety Code; Sections 11186 - 11188 and 11507.7, Government Code.

**§60075.28. Subpoena and Subpoena Duces Tecum.**

(a) Subpoenas and subpoenas duces tecum may be issued for attendance at a hearing and for production of documents at any reasonable time and place or at a hearing.

(b) Subpoenas and subpoenas duces tecum shall be issued by the hearing officer assigned to a proceeding, general counsel, or executive officer at the request of a party or, if represented by an attorney, the attorney of record for a party in accordance with sections 1985-1985.4 of the California Code of Civil Procedure.

(c) The custodian of documents that are the subject of a subpoena duces tecum may satisfy the subpoena by delivery of the documents or a copy of the documents, or by making the documents available for inspection or copying, together with an affidavit in compliance with section 1561 of the Evidence Code.

(d) The process extends to all parts of the state and shall be served in accordance with sections 1987 and 1988 of the California Code of Civil Procedure. A subpoena or subpoena duces tecum may also be delivered by certified mail return receipt requested or by messenger. Service by messenger shall be effected when the witness acknowledges receipt of the subpoena to the sender, by telephone, by mail, or in person, and identifies himself or herself either by reference to date of birth and driver's license number or Department of Motor Vehicles identification number, or the sender may verify receipt of the subpoena by obtaining other identifying information from the recipient. The sender shall make a written notation of the acknowledgment. A subpoena issued and acknowledged pursuant to this section has the same force and effect as a subpoena personally served. Failure to comply with a subpoena issued and acknowledged pursuant to this section may be punished as a contempt and the subpoena may so state. A party requesting a continuance based upon the failure of a witness to appear at the time and place required for the appearance or testimony pursuant to a subpoena, shall prove that the party has complied with this section. The continuance shall only be granted for a period of time that would allow personal service of the subpoena and in no event longer than that allowed by law.

(e) No witness is obliged to attend unless the witness is a resident of the state at the time of service.

(f) Upon timely motion of a party or witness, or upon his or her own motion, after notice to the parties and an opportunity to be heard and upon a showing of good cause, the hearing officer may order the quashing of a subpoena or subpoena duces tecum entirely, may modify it, or may

direct compliance with it upon other terms or conditions. In addition, the hearing officer may make any other order as may be appropriate to protect a party or witness from unreasonable or oppressive demands.

(g) The state board may quash a subpoena or a subpoena duces tecum that it has issued on its own motion.

(h)(1) In the case of the production of a party to the record of a proceeding or of a person for whose benefit a proceeding is prosecuted or defended, the service of a subpoena on the witness is not required if written notice requesting the witness to attend, with the time and place of the hearing, is served on the representative of the party or person.

(2) Service of written notice to attend under this section shall be made in the manner and is subject to the conditions provided in section 1987 of the California Code of Civil Procedure for service of written notice to attend in a civil action or proceeding.

(i) A witness other than an employee of the state or a political subdivision thereof appearing pursuant to a subpoena or a subpoena duces tecum, other than a party, shall receive the same mileage, and appearance fees allowed by law; such fees are to be paid by the party at whose request the witness is subpoenaed.

NOTE: Authority cited: Sections 39600, 39601, 43028 and 43031(a), Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 43150, 43028 and 43031(a), Health and Safety Code; Sections 11186 - 11188, 11450.05 - 11450.30, Government Code; Section 1561, Evidence Code, Sections 1985 - 1985.4, 1987 and 1988, California Code of Civil Procedure.

#### **§ 60075.29. Contempt.**

(a) If any person in proceedings before the hearing officer disobeys or resists any lawful order or refuses to respond to a subpoena, subpoena duces tecum, or refuses to take the oath or affirmation as a witness or thereafter refuses to be examined, or is guilty of misconduct during a hearing or in its immediate vicinity as to obstruct the proceedings, the hearing officer may certify the facts to the Superior Court in and for the county where the proceedings are held for contempt proceedings pursuant to Government Code sections 11455.20, and 11186 through 11188.

(b) Notwithstanding the above, the hearing officer may order a party, a party's representative or both, to pay reasonable expenses, including authorized representation fees, incurred by another party as a result of bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay.

(1) “Actions or tactics” include, but are not limited to, the making or opposing of motions; the failure to comply with a discovery request or subpoena; or the failure to comply with a lawful order of the hearing officer.

(2) “Frivolous” means:

(A) Totally and completely without merit, or

(B) For the sole purpose of harassing an opposing party.

(c) An order for sanctions may be oral, on the record, or in writing and shall set forth the factual findings which are the basis for the imposition of sanctions.

(1) In determining reasonable expenses, the party or parties to whom payment is to be made shall, at the hearing officer’s discretion, either make a statement on the record under oath or submit a written declaration under penalty of perjury setting forth with specificity the expenses incurred as a result of the other party’s conduct.

(2) Within 5 days of the receipt of the hearing officer’s order for the payment of expenses, a party or representative may, on grounds of hardship, request reconsideration from the hearing officer issuing the order. The request for reconsideration shall be filed in writing, and include a declaration under penalty of perjury.

(d) The order or denial of an order to pay expenses under paragraph (b) is subject of procedural review in the same manner as a final decision pursuant to Subarticle 12.

Note: Authority cited: Sections 39600, 39601, 43028 and 43031(a), Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 43105, 43028 and 43031(a), Health and Safety Code; Section 11525, Government Code.

## **Subarticle 26. Hearings.**

### **§ 60075.30 26. Time and Place of Hearing.**

(a) Within 30 days of deeming the request for hearing complete and serving the notice of filing to the respondent, the filing of the request for hearing, the Hearing Office shall schedule the hearing date. A matter shall be scheduled to be heard as soon as practicable, but no later than 90 days after a request for hearing has been filed.

(b) The Hearing Office shall deliver or mail a notice of hearing to all parties at least 30 days prior to the hearing. The notice shall be in the form specified in section 11509 of the Government Code.

(c) The hearing officer may, on his or her own motion or upon request of any party accompanied by a showing of good cause, grant such delays or continue a hearing to another time or place as may be necessary or desirable in the interest of fairly resolving the case.

(1) A party shall apply to the hearing officer for a continuance not less than 5 days prior to the scheduled hearing.

(2) When a continuance is ordered during a hearing, the hearing officer shall give written notice of the time and place of the continued hearing.

~~(d)~~(e) The Hearing Office shall set the place of hearing at a location as near as practicable to the place where the respondent owner resides or maintains a place of business in California. If the respondent owner does not reside or maintain a place of business in California, the hearing shall be in Sacramento. The Hearing Office may establish hearing locations anywhere in the state; at a minimum one hearing location shall be established in Sacramento and one in the Los Angeles area.

(e) Upon the motion of any party and a showing of good cause, or upon the motion of the hearing officer, and in the absence of an objection from any party, the hearing officer may exercise discretion to conduct all or part of a hearing by telephone or other electronic means.

(1) In granting such a motion, the hearing officer must be assured that each participant in the hearing has an opportunity to participate in and to hear the entire proceeding while it is taking place and to observe all exhibits fully.

(2) The hearing officer may direct the party who has requested the alternative method to make the necessary arrangements and be responsible for any associated costs.

NOTE: Authority cited: Sections 39600, 39601, 43028, 43031(a) and 44011.6(m)(i), Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 43028, 43031(a) and 44011.6, Health and Safety Code; Sections 11509 and 11440.30, Government Code.

#### **§ 60075.31 27. Consolidation and Separation of Cases.**

(a) The hearing officer may consolidate for hearing and decision any number of proceedings involving the same respondent owner.

(b) Upon motion of a party or upon his or her own motion, the hearing officer may consolidate for hearing and decision any number of proceedings involving common issues of law or fact where consolidation would expedite and simplify consideration of the issues and would not adversely affect the rights of parties engaged in otherwise separate proceedings.

(c) Upon the motion of a party or upon the hearing officer's own motion, the hearing officer may, in furtherance of convenience or to avoid prejudice or when separate hearings will be conducive to expedition and economy, order a separate hearing of any issue, including an issue raised in the notice of defense, or of any number of issues.

NOTE: Authority cited: Sections 39600, 39601, 43028, 43031(a) and 44011.6(m)(i), Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 43028, 43031(a) and 44011.6, Health and Safety Code; Section 11505.3, Government Code.

#### **§ 60075.32 28. Failure to Appear.**

(a) If after service of a notice of hearing, including notice of consolidated hearing or continuance, a party fails to appear at a hearing either in person or by representative, the hearing officer may take the proceeding off calendar, or may, at the request of a party or on his or her own motion, issue a default order in accordance with section 60075.38 37 of these rules.

NOTE: Authority cited: Sections 39600, 39601, 43028, 43031(a) and 44011.6(m)(i), Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 43028, 43031(a) and 44011.6, Health and Safety Code.

#### **§ 60075.33 29. Conduct of Hearing.**

(a) The hearing shall be presided over by a hearing officer and shall be conducted in the English language.

(b) The hearing officer shall conduct a fair and impartial hearing in which each party has a reasonable opportunity to be heard and to present evidence.

~~(b) Hearings shall be recorded electronically.~~

(c) Each party to the proceeding shall have these rights: To call and examine witnesses; to introduce exhibits; to question opposing witnesses on any matter relevant to the issues even though that matter was not covered in the direct examinations; to impeach any witness regardless of which party first called the witness to testify; and to rebut the opposing evidence against him. If a party does not testify on his or her behalf, the party may be called and examined as if under cross-examination.

(d) The complainant shall present the citation and the evidence supporting its issuance, and any other material that is pertinent to the issue to be determined by the hearing officer. The respondent has the right to examine, respond to, or rebut the citation and any proffered evidence and material. The respondent may offer any documents, testimony, or other exculpatory evidence which bears on appropriate issues, or may be relevant to the penalty amount. The hearing officer may call and examine a party or witness and may, on his or her own motion, admit any relevant and material evidence.

(e) At the close of respondent's presentation of evidence, the parties respectively have the right to introduce rebuttal evidence that is necessary to resolve disputed issues of material fact, subject to any limits imposed by the hearing officer pursuant to subparagraph (f)(1) below.

(f) The taking of evidence in a hearing shall be controlled by the hearing officer in the manner best suited to ascertain the facts and safeguard the rights of the parties. Prior to taking evidence, the hearing officer shall define the issues and the order in which evidence will be received.

(g) The hearing officer may:

(1) Limit the number of witnesses and the scope and extent of any direct examination, cross-examination, or rebuttal testimony, as necessary, to protect the interests of justice and conduct a reasonably expeditious hearing;

(2) Require the authentication of any written exhibit or statement; and

(3) Call and examine a party or witness and may, on his or her own motion, admit any relevant and material evidence.

(4) Exclude persons whose conduct impedes the orderly conduct of the hearing;

(5) Restrict attendance because of the physical limitations of the hearing facility; or

(6) Take other action to promote due process or the orderly conduct of the hearing.

(h) The taking of evidence in a hearing shall be controlled by the hearing officer in the manner best suited to ascertain the facts and safeguard the rights of the parties. Prior to taking evidence, the hearing officer shall define the issues and the order in which evidence will be received.

(i) Hearings shall be recorded electronically. The recording made by the Administrative Hearing Office shall be the official recording of the hearing.

(1) The hearing office will not normally prepare a verbatim transcript of the official recording, but the hearing officer may order one if deemed necessary to permit a full and fair review and resolution of the case. If not so ordered, a party may, at its own expense, request that a verbatim transcript be made. The party making the request shall provide one (1) copy to the hearing office and one (1) copy to the other party.

(2) The official recording of the hearing and transcript of the recording, together with all written submissions made by the parties, shall become part of the administrative record for the proceeding.

NOTE: Authority cited: Sections 39600, 39601, 43028, 43031(a) and 44011.6(m)(i), Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 43028, 43031(a) and 44011.6, Health and Safety Code.

**§ 60075.34 30. Evidence.**

(a) Testimony shall be taken only under oath or affirmation.

(b) The hearing need not be conducted according to technical rules relating to evidence and witnesses. The hearing officer shall admit evidence which is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions, and which is not irrelevant, immaterial, unduly repetitious, or otherwise unreliable or of little probative value. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. The application of these rules shall not affect the substantial rights of the parties as provided in the Evidence Code.

(c) The rules of privilege shall be effective to the extent that they are otherwise required by statute to be recognized at the hearing.

(d) Consistent with the provisions of section 60075.26(e), ~~T~~ trade secret and other confidential information may be introduced into evidence. The hearing officer shall take all precautions to preserve the confidentiality of such information, and may make such orders as may be necessary to consider such evidence in a closed meeting ~~camera~~, including the use of a supplemental order or decision to address matters which arise out of that portion of the evidence which is confidential. and other confidential information may be introduced into evidence.

(e) The hearing officer has discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time or unduly prejudices the other party.

(f)(e) In reaching a decision, official notice may be taken, either before or after submission of the proceeding for decision, of any generally accepted technical or scientific matter within the state board's area of expertise, and determinations, rulings, orders, findings and decisions, required by law to be made by the state board or the hearing officer.

(1)(f) The hearing officer shall take official notice of those matters set forth in section 451 of the Evidence Code.

(2)(f) The hearing officer may take official notice of those matters set forth in section 452 of the Evidence Code.

(3)(f) Each party shall give notice of a request to take official notice and be given reasonable opportunity on request to present information relevant to:

(A)(f) tThe propriety of taking official notice; and

(B)(2) tThe effect of the matter to be noticed.

NOTE: Authority cited: Sections 39600, 39601, 43028, 43031(a) and 44011.6(m)(f), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 43028, 43031(a) and 44011.6, Health and Safety Code; Section 451, 452, Evidence Code.

### **§ 60075.35 23. Evidence by Affidavit or Declaration.**

(a) At any time 10 or more days prior to a hearing or a continued hearing, a party may mail or deliver to the opposing party or parties a copy of any affidavit or declaration which the proponent proposes to introduce in evidence, together with a notice as provided in subdivision (b). Unless an opposing party, within 7 days after such mailing or delivery, mails or delivers to the proponent a request to cross-examine the affiant or declarant the opposing party's right to cross-examine such affiant or declarant is waived and the affidavit or declaration, if introduced in evidence, shall be given the same effect as if the affiant or declarant had testified orally. If an opportunity to cross-examine an affiant or declarant is not afforded after request therefore is made as herein provided, the hearing officer may allow the affidavit or declaration to be introduced into evidence, but if so allowed, it shall not only be introduced given the same effect as other hearsay evidence.

(b) The notice referred to in subdivision (a) shall be in the following form:

"The accompanying affidavit or declaration of [insert name of affiant or declarant] will be introduced as evidence at the hearing in [insert title and docket number or petition number of proceeding]. [Insert name] will not be called to testify orally and you will not be entitled to question the affiant or declarant unless you notify [insert name of the proponent, representative, agent or attorney] at [insert address] that you wish to cross-examine the affiant or declarant. To be effective, your request must be mailed or delivered to [insert name of proponent, representative, agent or attorney] on or before [insert a date 7 days after the date of mailing or delivery of the affidavit to the opposing party]."

NOTE: Authority cited: Sections 39600, 39601, 43028, 43031(a) and 44011.6(m)(i), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 43028, 43031(a) and 44011.6, Health and Safety Code.

**~~§ 60075.31. Interpreters.~~**

~~A party who does not proficiently speak or understand the English language or is unable to be understood directly by the hearing officer and requests language assistance shall be provided, during the hearing, an interpreter in accordance with the provisions of section 11501.5 of the Government Code.~~

~~NOTE: Authority cited: Sections 39600, 39601, and 44011.6(i), Health and Safety Code. Reference: Section 44011.6, Health and Safety Code; Section 11501.5. Government Code.~~

**~~§ 60075.32. Continuance of Hearing.~~**

~~(a) The hearing officer may, on his or her own motion or upon request of any party accompanied by a showing of good cause, continue a hearing to another time or place.~~

~~(b) A party shall apply to the hearing officer for a continuance not less than 5 days prior to the scheduled hearing.~~

~~(c) When a continuance is ordered during a hearing, the hearing officer shall give written notice of the time and place of the continued hearing.~~

~~NOTE: Authority cited: Sections 39600, 39601, and 44011.6(i), Health and Safety Code. Reference: Section 44011.6, Health and Safety Code.~~

**~~§ 60075.33. Representation at Hearing.~~**

~~(a) A party may appear in person or through a representative, who is not required to be an attorney at law.~~

~~(b) A representative of a party shall be deemed to control all matters respecting the interest of such party in the proceeding. Persons who appear as representatives shall not engage in unethical conduct or intentionally fail to observe the provisions of the Title 13, California Code of Regulations, section 2180 et seq., the proper instructions or orders of the hearing officer, or these rules.~~

~~(c) A representative may withdraw an appearance by filing a written notice of withdrawal with the Hearing Office and by serving a copy on all parties.~~

~~NOTE: Authority cited: Sections 39600, 39601, 44011.6(i), Health and Safety Code. Reference: Section 44011.6, Health and Safety Code.~~

**~~§ 60075.36~~ 34. Exclusion of Witnesses.**

~~(a) Upon motion of a party, the hearing officer may exclude from the hearing room any witnesses, other than the parties themselves or their representatives, not at the time under examination, ; but a party to the proceeding and the party's representative, the staff of the state board and the staff's representative, and the officer shall not be excluded.~~

~~NOTE: Authority cited: Sections 39600, 39601, 43028, 43031(a) and 44011.6(m)(i), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 43028, 43031(a) and 44011.6, Health and Safety Code.~~

**~~§ 60075.37~~ 35. Oral Argument and Briefs.**

~~(a) Prior to the close of the hearing, the hearing officer may, on his or her own motion or upon motion of a party, grant oral argument.~~

~~(b) Motions to submit written argument shall be made prior to the close of the hearing and shall be granted at the discretion of the hearing officer upon a determination that written argument will be productive and will not unreasonably delay the disposition of the proceeding. If granted, a party shall file written argument within 15 working days from the date of the hearing. Opposing parties may file an answer within 10 working days from service of the argument. The hearing officer may extend or reduce the above filing dates for submission of written argument for good cause.~~

NOTE: Authority cited: Sections 39600, 39601, 43028, 43031(a) and 44011.6(m)(f), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 43028, 43031(a) and 44011.6, Health and Safety Code.

**~~§ 60075.36. Contempt.~~**

~~If any person in proceedings before the hearing officer disobeys or resists any lawful order or refuses to respond to a subpoena, subpoena duces tecum, or refuses to take the oath or affirmation as a witness or thereafter refuses to be examined, or is guilty of misconduct during a hearing or so near the place thereof as to obstruct the proceedings, the hearing officer may certify the facts to the Superior Court in and for the county where the proceedings are held for contempt proceedings pursuant to Government Code section 11525.~~

~~NOTE: Authority cited: Sections 39600, 39601, 44011.6(i), Health and Safety Code. Reference: Section 44011.6, Health and Safety Code; Sections 11182, 11188, 11525, Government Code.~~

**Subarticle 10 7. Decisions After Hearing**

**~~§ 60075.38 37. Default Order.~~**

(a) A party may be found to be in default upon failure to appear at hearing without good cause.

~~(1)(i)~~ No finding of default shall be made against the respondent ~~owner~~ unless the staff of the state board presents sufficient evidence to establish a prima facie showing that the citation was properly issued and the penalty appropriate.

~~(2)(ii)~~ Default by the complainant ~~staff of the state board~~ shall result in dismissal of the citation with prejudice.

(b) If a default against a respondent in a complaint proceeding occurs, the state board, within 10 days, shall present written evidence supported by affidavits or declarations, substantiating the proposed penalty set forth in the complaint.

~~(c)(b)~~ If the hearing officer determines that a default has occurred, he or she shall issue a default order against the defaulting party. Except as provided in section 60075.17(e), ~~¶~~ this order shall constitute a decision or order after hearing for purposes of section 60075.40 38 of these rules.

~~(d)(c)~~ Any proceeding may be reinstated by the hearing officer upon a showing of good cause that contains sufficient facts to show or establish a reasonable basis for the failure to appear at the

hearing. The request for reinstatement shall be made by the defaulting party within 30 days of service of the default order pursuant to section 60075.38(d) of these rules.

NOTE: Authority cited: Sections 39600, 39601, 43028, 43031(a) and 44011.6(m)(i), Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 43028, 43031(a) and 44011.6, Health and Safety Code.

**§ 60075.39. Penalty Assessment Criteria.**

(a) For citations issued under Health and Safety Code section 44011.6 and the regulation adopted pursuant thereto, Title 13, California Code of Regulations, sections 2180, et seq., the hearing officer shall follow the penalty schedule outlined in Title 13, CCR, section 2185.

(b) In determining penalties for citations issued under Health and Safety Code section 43028, the hearing officer shall consider all relevant circumstances, including, but not limited to:

(1) The extent of harm caused by the violation to public health and safety and to the environment;

(2) The nature and persistence of the violation, including the magnitude of the excess emissions;

(3) The compliance history of the respondent, including the frequency of past violations;

(4) The preventive efforts taken by respondent, including the record of maintenance and any program to ensure compliance;

(5) The innovative nature and the magnitude of the effort required to comply, and the accuracy, reproducibility, and repeatability of the available test methods;

(6) The efforts to attain, or provide for, compliance;

(7) The cooperation of the respondent during the course of the investigation and any action taken by the defendant, including the nature, extent, and time of response of any action taken to mitigate the violation; and

(8) For the person who owns a single retail service station, the size of the business.

NOTE: Authority cited: Sections 39600, 39601, 43028, 43031(a) and 44011.6(m), Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 43028, 43031(a) and 44011.6, Health and Safety Code.

**§ 60075.40 38. Decision or Order After Hearing; Correction of Mistakes or Errors;  
Effective Date of Decision.**

(a) Unless otherwise ordered, all proceedings shall be submitted at the close of the hearing. The hearing officer may extend the submission date and shall, within 30 days after the proceeding is submitted, ~~summarize the evidence received and relied upon,~~ make findings upon all facts relevant to the issues for hearing, and file an order or decision with the reasons or grounds upon which the order or decision was made.

(b) The order or decision shall be in writing, signed and dated by the hearing officer deciding the proceeding.

(c) The order or decision may, based on the findings of fact, affirm, modify or vacate the citation or penalty, or direct other relief as appropriate.

(d) A copy of the order or decision shall be served on each party or representative together with a statement informing the parties of their right to request ~~a rehearing pursuant to section 60075.39 or to petition that the executive officer for reconsideration of the order or decision pursuant to sections 60075.43, et seq. 41~~ of these rules.

(e) (1) Within 5 days of the filing of any order or decision, the hearing officer may, at the request of any party or on his or her own motion, on the basis of mistake of law or fact, issue a modified order or decision correcting a mistake or error with respect to any matters determined or covered by the previously issued order or decision. If necessary, the hearing officer may schedule further proceedings to address the issue(s).

(2) If a request has been filed under this subparagraph, the request shall be deemed denied if the hearing officer has taken no action to address the request within 15 days of filing of the request.

(3) The hearing office shall serve a copy of the modified order or decision on each party that had previously been served with the original order or decision.

(f) The hearing officer shall certify the administrative record and shall make available copies of the administrative record and any issued orders or decisions to the executive officer.

(g) The order or decision of the hearing officer shall become effective 20 days after it has been served on the respondent, unless the executive officer, on his or her own motion, issues an order of reconsideration or grants a further stay, or a request for reconsideration has been filed by a party pursuant to section 60075.41. If a request for reconsideration has been filed, the effective

date of the decision shall automatically be stayed for at least 20 additional days from the date of filing of the request for reconsideration.

NOTE: Authority cited: Sections 39600, 39601, 43028, 43031(a) and 44011.6(m)(i), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 43028, 43031(a) and 44011.6, Health and Safety Code.

**~~§ 60075.39. Rehearing by Hearing Officer.~~**

~~(a) At any time within 5 days of the filing of any order or decision, the hearing officer may, at the request of any party or on his or her own motion, on the basis of mistake of law or fact, order a rehearing with respect to any matters determined or covered by the order or decision. The hearing officer shall notify the parties if a rehearing is ordered.~~

~~(b) A party may, within 15 days of service of any order for of rehearing file a response with the Hearing Office which~~

~~(c) Any response shall be signed by the party filing or by the representative and verified upon oath.~~

~~NOTE: Authority cited: Sections 39600, 39601 and 44011.6(i), Health and Safety Code. Reference: Section 44011.6, Health and Safety Code.~~

**~~§ 60075.40. Final Order or Decision.~~**

~~(a) If no petition for reconsideration has been filed within 20 days of the service of an order or decision, and no reconsideration has been ordered by the executive officer on his or her own motion in accordance with section 60075.41 of these rules, the order or decision filed pursuant to section 60075.38 of these rules is a final order and not subject to review by any court or agency 60 days after service by mail on the parties.~~

~~(b) Any petition for reconsideration shall be deemed to have been denied by the executive officer if it is not acted upon within 20 days of service and the order or decision filed pursuant to section 60075.38 of these rules is a final order and not subject to review by any court or agency 60 days after service by mail on the parties. The executive officer may, however, upon a showing of good cause, extend the time within which the petition for reconsideration must be acted upon for a period not exceeding 10 days.~~

~~Note: Authority cited: Sections 39600, 39601 and 44011.6(i), Health and Safety Code. Reference: Section 44011.6, Health and Safety Code.~~

## Subarticle 11 8. Reconsideration by the Executive Officer

### **§ 60075.41. Reconsideration; On Motion of Executive Officer or by Request of Party.**

(a) At any time within 20 days of the filing of an order or decision of the hearing officer, pursuant to section 60075.40 38 of these rules, ~~including an order or decision after rehearing~~, the executive officer may, on his or her own motion, determine that ~~order~~ reconsideration is appropriate with respect to any matters determined or covered by the order or decision of the hearing officer. The executive officer shall notify the parties and the hearing office ~~if he or she orders reconsideration of his or her determination~~.

(b) A party aggrieved by an order or decision of the hearing officer, pursuant to section 60075.40 38 of these rules, ~~including an order or decision after rehearing~~, may, within 20 days of service of such order or decision, petition request that the executive officer ~~for reconsideration with respect to~~ any matters determined or covered by the order or decision ~~in accordance with section 60075.43 of these rules~~. The petition request for reconsideration shall be filed with the executive officer and shall be served on all parties in accordance with section 60075.4 of these rules, except that the original of the request shall be filed with the executive officer, and the hearing office shall receive a copy. The petition request shall be deemed filed the date it is delivered or mailed to the executive officer.

Note: Authority cited: Sections 39600, 39601, 43028, 43031(a) and 44011.6(m), Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 43028 and 44011.6, Health and Safety Code.

### **§ 60075.42 Reconsideration; Procedural Requirements.**

~~(a)(c)~~ The petition request for reconsideration shall be signed by the party filing the request or ~~its~~ ~~by his or her~~ representative and verified upon oath. The petition request may only request reconsideration of issues that were raised before the hearing officer and may only ~~shall~~ be based upon one or more of the following grounds:

(1)~~(i)~~ ~~That by~~ In issuing the order or decision, the hearing officer acted without or in excess of his or her powers;

(2)~~(ii)~~ ~~That t~~ The order or decision was procured by fraud;

(3)~~(iii)~~ ~~That t~~ The evidence received by the hearing officer does not justify the findings of fact;

~~(4)(iv) That~~ The petitioner has discovered new material evidence which the petitioner could not, with reasonable diligence, have discovered and produced at the hearing;

~~(5)(v) That t~~ The findings of fact do not support the order or decision; and

(6) The order or decision is contrary to applicable law.

~~(d) The petition for reconsideration may include a request that the decision of the hearing officer be stayed pending resolution of the petition for reconsideration.~~

~~(e) A party may, within 10 days of service of any notice of or petition for reconsideration, file an answer with the executive officer. The answer shall be signed by the party filing or by the representative and verified upon oath.~~

(b) (1) Any request for reconsideration shall set forth specifically and in full detail the grounds upon which the party making the request considers the order or decision to be unjust or unlawful and every issue to be considered by the executive officer on reconsideration. The party making the request shall be deemed to have waived all objections, irregularities, and illegalities concerning the proceeding upon which reconsideration is sought other than those specifically set forth in the petition for reconsideration.

(2) The petition for reconsideration will be denied if it contains no more than allegations of the statutory grounds for reconsideration, unsupported by specific references to the record and principles of law involved.

(c) When a request for reconsideration or answer thereto has been timely filed, the filing of supplemental requests or answers in response may be granted at the discretion of the executive officer. Parties requesting a copy of the hearing record shall bear the cost of reproduction.

~~(f) Upon reconsideration, the the executive officer may:~~

~~(i) Affirm, rescind, alter, or amend the findings, order or decision, or~~

~~(ii) Direct the taking of additional evidence either by submission or further hearing as provided in sections 60075.44 and 60075.45 of these rules.~~

~~(g) If he or she is satisfied that no additional evidence is necessary, after considering the record, the executive officer may enter his or her own order, findings, or decision after reconsideration.~~

(d) The request for reconsideration may include, and the executive officer may grant, a request that the decision of the hearing officer be stayed pending resolution of the petition for reconsideration.

(e) Within 10 days of being served with notice of a request for reconsideration, a party opposed to the request may file an opposition to the request with the executive officer or the state board secretary, as applicable. The opposition shall be signed and verified under oath by the party or its representative and shall not exceed 6 pages.

NOTE: Authority cited: Sections 39600, 39601, 43028, 43031(a) and 44011.6(m)(i), Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 43028, 43031(a) and 44011.6, Health and Safety Code.

#### **§ 60075.43. Reconsideration; Orders and Decisions by the Executive Officer.**

(a) Unless the executive officer expressly finds otherwise, a request for reconsideration shall be deemed summarily denied if the executive officer does not issue a finding that reconsideration is warranted within 20 days of filing of the request. For those matters deemed summarily denied, the order or decision of the hearing officer issued pursuant to section 60075.40 shall be considered final pursuant to section 60075.44.

(b) If the request for reconsideration has not been summarily denied pursuant to subparagraph (a) above in reconsidering the decision or order of the hearing officer, the executive officer may:

(1) Review some, but not all, issues raised by the request;

(2) Grant an order to stay, suspend, or postpone, the order or decision of the hearing officer, findings, or decision after reconsideration;

(3) Affirm, rescind, or amend the findings, order or decision of the hearing officer; or

(4) Direct the reopening of the hearing for the taking of additional evidence and issuance of supplementary findings of fact. The executive officer may direct that the taking of such evidence be done by either written submission or further testimony under oath before the executive officer or a hearing officer. The hearing shall be reopened for the limited purposes identified by the executive officer in his order. Notice of the time and place of further hearings shall be given to all parties and to such other persons as the hearing officer may direct.

(c) For those decisions and orders of the hearing officer for which reconsideration is undertaken, the executive officer shall issue his or her final disposition of the request as expeditiously as possible. A decision or order that is the final disposition of the request for

reconsideration shall be in writing and any modifications to the order or decision of the hearing officer shall be supported with additional findings, facts and conclusions of law.

NOTE: Authority cited: Sections 39600, 39601, 43028, 43031(a) and 44011.6(m), Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 43028, 43031(a) and 44011.6, Health and Safety Code.

**~~§ 60075.42. Suspension of Order or Decision.~~**

~~The executive officer may stay, suspend, or postpone the order or decision of the hearing officer pending an order, findings, or decision after reconsideration.~~

~~Note: Authority cited: Sections 39600, 39601 and 44011.6(i), Health and Safety Code.  
Reference: Section 40011.6, Health and Safety Code.~~

**~~§ 60075.43. Petition for Reconsideration; Request for Hearing Record; Supplemental Petition.~~**

~~(a) Any petition for reconsideration shall set forth specifically and in full detail the grounds upon which the petitioner considers the order or decision to be unjust or unlawful, and every issue to be considered by the executive officer on reconsideration. The petitioner shall be deemed to have finally waived all objections, irregularities, and illegalities concerning the proceeding upon which reconsideration is sought other than those set forth in the petition for reconsideration. The petition for reconsideration will be denied if it contains no more than allegations of the statutory grounds for reconsideration, unsupported by specific references to the record and principles of law involved.~~

~~(b) When a petition for reconsideration or answer thereto has been timely filed, the filing of supplemental petitions or answers may be granted at the discretion of the executive officer. Parties requesting a copy of the hearing record shall bear the cost of reproduction.~~

~~NOTE: Authority cited: Sections 39600, 39601 and 44011.6(i), Health and Safety Code.  
Reference: Section 44011.6, Health and Safety Code.~~

**~~§ 60075.44. Taking of Additional Evidence by Submission.~~**

~~When reconsideration has been granted, either by petition or on the executive officer's own motion, the executive officer may request that additional evidence be submitted. Notice and an opportunity to respond to the request shall be given to all parties.~~

~~NOTE: Authority cited: Sections 39600, 39601 and 44011.6(i), Health and Safety Code.  
Reference: Section 44011.6, Health and Safety Code.~~

**~~§ 60075.45. Taking of Additional Evidence by Further Hearing.~~**

~~(a) When reconsideration has been granted either by petition or on the executive officer's own motion, the executive officer may order that additional evidence be taken at a further hearing and that additional findings of fact be made by the hearing officer. Notice of the time and place of further hearing shall be given to all parties and to such other persons as the hearing officer may direct.~~

~~(b) The issues on further hearing shall be limited to those set forth in the order.~~

~~(c) The time limit in section 60075.38 of these rules for filing an order or decision shall not apply to further hearings during reconsideration.~~

~~NOTE: Authority cited: Sections 39600, 39601 and 44011.6(i), Health and Safety Code.  
Reference: Section 44011.6, Health and Safety Code.~~

**~~§ 60075.46. Final Order of Decision After Reconsideration.~~**

~~If the executive officer orders reconsideration of a decision or order pursuant to section 60075.38 and additional evidence, if necessary, has been taken by submission or further hearing, the order or decision granting disposition of the reconsideration is a final order, and not subject to review by any court or agency 60 days after service by mail on the parties.~~

~~NOTE: Authority cited: Sections 39600, 39601 and 44011.6(i), Health and Safety Code.  
Reference: Section 44011.6, Health and Safety Code.~~

**Subarticle 12. Final Orders and Decisions**

**§ 60075.44. Final Order or Decision; Effective Date**

(a) Pursuant to sections 60075.17 and 60075.22(b), if a respondent fails to request a hearing to contest the issuance of a citation within the time period provided, the citation becomes a final order and the stated penalty due and payable.

(b) If no request for reconsideration of the order or decision of the hearing officer has been filed within 20 days of the service of an order or decision under section 60075.41(b) of these rules, and if the executive officer, on his or her own motion, has not issued a finding that reconsideration is appropriate under section 60075.41(a), the order or decision of the hearing officer shall become final. The effective date of the final decision or order shall be 20 days after the date the order or decision of the hearing officer was served by mail on the parties.

(c) If a party has filed a request for reconsideration and it has been deemed summarily denied pursuant to section 60075.43(a), because the executive officer has not acted upon the request within the time provided, the order or decision of the hearing officer shall become final. The effective date of the hearing officer order or decision becoming final shall be 20 days from the date that the request for reconsideration was filed.

(d) If the executive officer issues a finding that reconsideration is warranted, the order or decision of the executive officer providing full disposition of the request for reconsideration pursuant to 60075.44(b) shall be the final order or decision and shall become effective on the date that it is served by mail on the parties.

NOTE: Authority cited: Sections 39600, 39601, 43028, 43031(a) and 44011.6(m), Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 43028, 43031(a) and 44011.6, Health and Safety Code.

## **Subarticle 13 9. Judicial Review**

### **§ 60075.45 47. Judicial Review.**

~~The decision or order of the hearing officer, or if the decision or order has been issued by the executive officer after reconsideration, the executive officer, is the final decision or order unless the owner seeks~~

(a) Except for orders that have become final because a respondent has failed to request a hearing to contest a citation (see sections 60075.17, 60075.22(b) and 60075.44(a)), a party may seek judicial review of a final order or decision by administrative mandamus pursuant to section 1094.5 of the Code of Civil Procedure within 60 days after mailing of the decision or order. The right to petition shall not be affected by the failure to seek reconsideration before the agency.

(1) For citations arising under section 44011.6 of the Health and Safety Code, the respondent may file for judicial review within 60 days from the date the order or decision becomes final under section 60075.44.

(2) For all citations issued under section 43028 of the Health and Safety Code, the respondent may file for judicial review within 30 days from the date the order or decision becomes final under section 60075.44.

(b) The state board may seek to enforce a final order in accordance with applicable law or decision in Superior Court. ~~The final order or decision may be enforced in accordance with section 44011.6(j):~~

NOTE: Authority cited: Sections 39600, 39601, 43028, 43031(a) and 44011.6(m)(i), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 43028, 43031(a) and 44011.6, Health and Safety Code; Section 1094.5, Code of Civil Procedure.

Attachment B

PROPOSED

State of California  
Air Resources Board

CALIFORNIA REGULATIONS FOR ADMINISTRATIVE HEARING  
PROCEDURES FOR REVIEW OF COMPLAINTS

Adopted:\_\_\_\_\_

**NOTE:** This is a proposed new document. All proposed language is indicated by *italics*.

## **PROPOSED REGULATION ORDER**

***Adopt Article 4.5, Subchapter 1, Chapter 1, Division 3, Title 17,  
California Code of Regulations, to read as follows:  
Administrative Hearing Procedures for Review of Complaints***

### ***Subarticle 1. General Provisions***

#### **§ 60065.1. Applicability.**

*(a) This article governs hearings to review complaints issued by the state board pursuant to Health and Safety Code section 43028. The procedures outlined here do not apply to citations that are subject to review under Article 5, section 60075, et seq.*

*(b) The provisions of this article apply only to complaints filed on or after the effective date of this article.*

*Note: Authority cited: Sections 39600, 39601, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 43105, 43028 and 43031(a), Health and Safety Code; Sections 60075, et seq., Title 17 and 2048, Title 13, California Code of Regulations; Sections 11500, et seq., Government Code.*

#### **§ 60065.2. Definitions.**

*(a) The definitions applicable to these rules include those set out in the Health and Safety Code (commencing with section 39010) and in Title 13, California Code of Regulations, Chapter 5, Standards for Motor Vehicle Fuels, sections 2250, et seq., and Chapter 8, Clean Fuels Program, sections 2300, et seq.*

*(b) The following definitions also apply:*

*(1) "Administrative record" means all documents and records timely filed with the hearing office, pursuant to section 60065.4 and the time deadlines of these rules, including pleadings, petitions, and motions; all documents or records admitted into evidence or administratively noticed by the hearing officer; all official recordings or written transcripts of hearings conducted; and all orders or decisions issued by the hearing officer or executive officer regarding the complaint at issue; administrative record does not include any prohibited communications as defined in section 60065.13, and any settlement discussions or offers of settlement pursuant to section 60065.25.*

(2) *“Complainant” means the state board, acting through any of its employees that have been authorized to investigate, issue, and prosecute a complaint under this article.*

(3) *“Complaint” means a document issued by the complainant that alleges a violation(s) of Part 5 of the Health and Safety Code (other than a Class I violation for which a citation may be issued under Article 5 of this chapter) or any rule, regulation, permit, variance, or order of the state board, pertaining to fuel requirements and standards.*

(4) *“Consent Order” means an order entered by the hearing officer in accordance with the settlement agreement of the parties.*

(5) *“Days” means calendar days.*

(6) *“Default” means the failure of any party to take the steps necessary and required by these regulations to further the hearing towards resolution, resulting in a finding by the hearing officer of forfeiture of the cause of action against that party.*

(7) *“Discovery” refers to the process set forth in section 60065.26 allowing one party to request and obtain information relevant to the complaint proceedings. The scope of discovery is limited by the express terms of that section.*

(8) *“Ex Parte Communication” means an oral or written communication not on the public record for which reasonable prior notice to all parties should have been given.*

(9) *“Hearing Office” refers to the administrative hearings office established by the state board to conduct administrative hearings to implement the provisions of these rules or to the Office of Administrative Hearings established pursuant to Government Code section 11370.2. The administrative hearing office of the state board shall include at least one administrative law judge who shall act as a hearing officer.*

(10) *“Hearing Officer” is an administrative law judge appointed by the state board to conduct hearings under these procedures. Only appointed administrative law judges shall act as hearing officers.*

(11) *“Party” includes the complainant and respondent.*

(12) *“Proceeding” means any hearing, determination or other activity before the hearing officer involving the parties to a complaint.*

(13) *“Respondent” means any person against whom a complaint has been filed under this article.*

(14) “Response” means a document, responsive to the complaint and signed by the respondent, in which respondent admits or denies the allegations of the complaint or asserts affirmative defenses to the action.

(15) “Settlement Agreement” means a written agreement executed by either the complainant and respondent that respectively settles the allegations of violation set forth in the complaint. Settlement agreements of a complaint should include:

(A) Stipulations by the parties establishing subject matter jurisdiction;

(B) An admission by respondent that it has committed the violations as alleged in the complaint or a statement by respondent that it neither admits nor denies such violation(s); and

(C) Agreement as to the assessment of a stated civil penalty, with or without conditions.

NOTE: Authority cited: Sections 39600, 39601, 43028, 43031(a) and 39010, et seq., Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 39514, 43105, 43028 and 43031(a), Part 5, (commencing with 39010) Health and Safety Code; Sections 2250, et seq., 2300, et seq., Title 13; Sections 60075.1, et seq., Article 5, Title 17, California Code of Regulations.

### **§ 60065.3. Right to Representation.**

(a) A party may appear in person or through a representative, who is not required to be an attorney at law. The right to representation is at the party’s own expense. Following notification that a party is represented by a person other than him or herself, all further communications regarding the proceedings shall be directed to that representative.

(b) A representative of a party shall be deemed to control all matters respecting the interest of such party in the proceeding. Persons who appear as representatives shall not engage in unethical conduct or intentionally fail to observe the procedures set forth in these rules and the proper instructions or orders of the hearing officer.

(c) A representative may withdraw an appearance by filing a written notice of withdrawal with the hearing office and by serving a copy on all parties.

NOTE: Authority cited: Sections 39600, 39601, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 43105, 43028 and 43031(a), Health and Safety Code; Sections 2180, et seq., Title 13, California Code of Regulations.

#### **§ 60065.4. Time Limits; Computation of Time.**

*(a) All actions required pursuant to these rules shall be completed within the times specified in this article, unless extended by the hearing officer upon a showing of good cause, after consideration of prejudice to other parties. Requests for extensions of time for the filing of any pleading, letter, document, or other writing or completing any other required action must be received in advance of the date on which the filing or action is due and should contain sufficient facts to establish a reasonable basis for the relief requested.*

*(b) In computing the time within which a right may be exercised or an act is to be performed, the day of the event from which the designated period runs shall not be included and the last day shall be included. If the last day falls on a Saturday, Sunday, or a state holiday, time shall be extended to the next working day.*

*(c) In computing time, the term "day" means calendar day, unless otherwise provided.*

*(d) Unless otherwise indicated by proof of service, the mailing date shall be presumed to be the postmark date appearing on the envelope if first-class postage was prepaid and the envelope was properly addressed.*

*(e) Where service of any pleading, petition, letter, document, or other writing is by mail, overnight delivery, or facsimile transmission (fax), pursuant to section 60065.5(c), and if within a given number of days after such service, a right may be exercised, or an act is to be performed, the time within which such right may be exercised or act performed shall be extended as provided in section 60065.5(c).*

*(f) Papers delivered to or received by the hearing office during regular business hours (8 a.m. to 5 p.m.) will be filed on that date. Papers delivered or received at times other than regular business hours will be filed on the next regular business day.*

*NOTE: Authority cited: Sections 39600, 39601, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 43105, 43028 and 43031(a), Health and Safety Code.*

#### **§ 60065.5. Service, Notice and Posting.**

*(a) Except as otherwise provided in this article, the original of every pleading, petition, letter, document, or other writing served in a proceeding under these rules shall be filed with the hearing office.*

*(b) The complaint and all accompanying information shall be served on the respondent personally or by registered mail.*

*(c) Except as provided in (b) above and unless otherwise required, service of any documents in the proceedings may be made by personal delivery; by United States first-class mail, by overnight delivery, or by fax.*

*(1) Service is complete at the time of personal delivery.*

*(2) In the case of first-class mail, the documents to be served must be deposited in a post office, mailbox or mail chute, or other like facility regularly maintained by the United States Postal Service, in a sealed envelope, properly addressed to the person on whom it is to be served at the address as last given by that person on any document filed in the present cause of action and served on the party making service or otherwise at the place of residence of the person to be served. The service is complete at the time of the deposit, but any period of notice and any right or duty to do any act or to make any response within any period or date prescribed after service of the document shall be extended five days if the place of address is within the State of California, ten days if the place of address is outside the State of California but within the United States, and fifteen days if the place of address is outside the United States.*

*(3) If served by overnight delivery, the document must be deposited in a box or other facility regularly maintained by the express service carrier, or delivered to an authorized courier or driver authorized by the express service carrier to receive documents, in an envelope or package designated by the express service carrier with delivery fees paid or provided for, addressed to the person on whom it is to be served, at the address as last given by the person on any document filed in the present cause of action and served on the party making service or otherwise at that place of residence of the person to be served. The service is complete at the time of the deposit, but any period of notice and any right or duty to do any act or to make any response within any period or date prescribed after service of the document shall be extended two days.*

*(4) If served by fax, the document must be transmitted to a fax machine maintained by the person on whom it is served at the fax machine telephone number as last given by that person on any document which he or she has filed in the present cause of action and served on the party making the service. The service is complete at the time of the transmission, but any period of notice and any right or duty to do any act or to make any response within any period or date prescribed after service of the document shall be extended two days.*

*(d) Each document filed shall be accompanied by a proof of service on each party or its representative of record on the date of service. The proof of service shall state whether such service was made personally, first-class mail, overnight delivery, or fax.*

*(1) Where service is made by personal delivery, the declaration shall show the date and place of delivery and the name of the person to whom the documents were handed. Where the person making the service is unable to obtain the name of her person to whom the documents were handed, the person making the service may substitute a physical description for the name.*

*(2) Where service is made by first-class mail or overnight delivery, the declaration shall show the date and place of deposit in the mail, the name and address of the person served as shown on the mailing envelope and that the envelope was sealed and deposited in the mail with the postage fully prepaid.*

*(3) Where service is made by fax, the declaration shall show the method of service on each party, the date sent, and the fax number to which the document was sent.*

*(e) The proof of service declaration shall be signed by the person making it and contain the following statement above the signature: "I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and this declaration was executed at (City, State) on (Date)." The name of the declarant shall be typed and signed below this.*

*(f) Proof of service made in accordance with Code of Civil Procedure section 1013a complies with this regulation.*

*(g) Service and notice to a party who has appeared through a representative shall be made upon such representative.*

*NOTE: Authority cited: Sections 39600, 39601, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 43105, 43028 and 43031(a), Health and Safety Code; Sections 11182 and 11184, Government Code; Sections 1013 and 1013a.*

#### **§ 60065.6. Motions.**

*(a) Any motion or request for action by the hearing officer relating to any proceeding pending before him or her filed by any party, except those made orally on the record at the hearing, shall be in writing and shall be directed to the hearing officer, with written notice and proof of service to all parties. The caption of each motion shall contain the title and docket number of the proceeding and a clear and plain statement of the relief sought, together with the grounds therefore.*

*(b) Except as otherwise provided by statute or these regulations, or as ordered by the hearing officer, a motion shall be made and filed at least 15 days before the date set for the motion to be*

*heard or the commencement of the hearing on the merits. Any response to the motion shall be filed and served no later than five days before the motion is scheduled to be heard or as ordered by the hearing officer.*

*(c) The hearing office shall set the time and place for the hearing of the motion. The hearing shall occur as soon as practicable.*

*(d) Except as otherwise provided by statute or these regulations, the hearing officer may decide a motion filed pursuant to this section without oral argument. Any party may request oral argument at the time of the filing of the motion or the response. If the hearing officer orders oral argument, the party requesting oral argument, or any party directed to do so by the hearing officer, shall serve written notice on all parties of the date, time and place of the oral argument. The hearing officer may direct that oral argument be made by telephone conference call. The hearing officer may order that the proceedings be recorded.*

*(e) The hearing officer shall issue a written order deciding any motion, unless the motion is made during the course of the hearing on the merits while on the record. The hearing officer may request that the prevailing party prepare a proposed order.*

*(f) A request for a prehearing conference or a settlement conference under sections 60065.27 and 60065.28 does not constitute a motion within the meaning of this section.*

*NOTE: Authority cited: Sections 39600, 39601, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 43105, 43028 and 43031(a), Health and Safety Code.*

#### **§ 60065.7. Form of Pleadings.**

*(a) Except as otherwise expressly provided in this article or by the hearing officer, there are no specific requirements as to the form of documents filed in a proceeding under these rules.*

*(b) The original of any pleading, letter, document, or other writing (other than an exhibit) shall be signed by the filing party or its representative. The signature constitutes a representation by the signer that it has read the document, that to the best of its knowledge, information and belief, the statements made therein are true, and that it has not filed the document for the purpose of delay.*

*(c) The initial document filed by any person shall indicate his or her status (as a party or representative of the party) and shall contain his or her name, address and telephone number.*

*Any changes in this information shall be communicated promptly to the hearing office and all parties to the proceeding. A party who fails to furnish such information and any changes to it shall be deemed to have waived his or her right to notice and service under these rules.*

*NOTE: Authority cited: Sections 39600, 39601, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 43105, 43028 and 43031(a), Health and Safety Code.*

**§ 60065.8. Limitations on Written Legal Arguments or Statements**

*(a) Any written legal argument or statement submitted to the hearing officer by a participant in an action under this part shall be double spaced and typed in a font size 12 point or larger. Except as otherwise provided by this part, further limited by the hearing officer, or otherwise authorized by the hearing officer for good cause shown, no written legal argument, exclusive of any supporting documentation, may exceed:*

*(1) Fifteen pages, for arguments in support of or opposition to motions; and*

*(2) Five pages, for reply arguments.*

*Note: Authority cited: Sections 39600, 39601, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 43105, 43028 and 43031(a), Health and Safety Code.*

**§ 60065.9. Records of the State Board.**

*Except where public disclosure of information or exhibits is restricted by law, records of the state board are public records and are available to the public pursuant to section 91000, et seq., Title 17, California Code of Regulations.*

*NOTE: Authority cited: Sections 39600, 39601, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 43105, 43028 and 43031(a), Health and Safety Code; Sections 6250, et seq., Government Code; Sections 91000, et seq., Title 17, California Code of Regulations.*

**§ 60065.10. Interpreters and Other Forms of Accommodation.**

*(a) In proceedings where a party, a party's representative, or a party's expected witness requires an interpreter for any language, including sign language, that party shall be responsible for notifying the hearing office as soon as the requirement is known, but no later*

*than ten days prior to the first day of hearing. The hearing officer may allow later notification for good cause. The hearing office shall be responsible for securing the interpreter, and for providing reasonable accommodation.*

*(b) The cost of interpreter services shall be paid by the state board if the hearing officer so directs. In determining who should pay the cost of the interpreter, the hearing officer shall base the decision on equitable considerations, including the ability of the party in need of the interpreter to pay the cost.*

*Note: Authority cited: Sections 39600, 39601, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 43105, 43028 and 43031(a), Health and Safety Code; Sections 11435.25, 11435.30 and 11435.55, Government Code; Section 751, Evidence Code.*

## ***Subarticle 2. Hearing Officers***

### ***§ 60065.11. Authority of Hearing Officers.***

*In any matter subject to hearing pursuant to these rules, the hearing officer shall have the authority to do any act and take all measures necessary for the maintenance of order and for the efficient, fair and impartial adjudication of issues arising in proceedings governed by these rules, including, but not limited to, authority to hold prehearing conferences; conduct hearings to determine all issues of fact and law presented; to rule upon motions, requests and offers of proof, dispose of procedural requests, and issue all necessary orders; administer oaths and affirmations and take affidavits or declarations; to issue subpoenas and subpoenas duces tecum for the attendance of a person and production of testimony, books, documents, or other things; to compel the attendance of a person residing anywhere in the state; to rule on objections, privileges, defenses, and the receipt of relevant and material evidence; to call and examine a party or witness and introduce into the hearing record documentary or other evidence; to request a party at any time to state the respective position or supporting theory concerning any fact or issues in the proceeding; to certify official acts; to extend the submittal date of any proceeding; to hear and determine all issues of fact and law presented and to issue such interlocutory and final orders, findings, and decisions as may be necessary for the full adjudication of the matter.*

*NOTE: Authority cited: Sections 39600, 39601, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 43105, 43028 and 43031(a), Health and Safety Code; Sections 11181-11182 and 11425.30, Government Code.*

**§ 60065.12. Disqualification.**

*(a) The hearing officer shall disqualify himself or herself and withdraw from any case in which he or she cannot accord a fair and impartial hearing.*

*(b) Any party may request the disqualification of a hearing officer or the executive officer, on a request for reconsideration, by filing an affidavit or declaration under penalty of perjury. A request against the hearing officer must be made no later than five days prior to the commencement of a prehearing conference or first day of hearing on the merits, whichever is earlier. A request for disqualification of the executive officer must be included in the request for reconsideration. The affidavit or declaration must state with particularity the grounds upon which it is claimed that a fair and impartial hearing cannot be accorded. The issue shall be respectively determined by either the hearing officer or the executive officer against whom the request for disqualification has been filed.*

*NOTE: Authority cited: Sections 39600, 39601, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 43105, 43028 and 43031(a), Health and Safety Code; Section 11425.40 and 11512, Government Code.*

**Subarticle 3. Ex Parte Communications**

**§ 60065.13. Prohibited Communications**

*(a) Except as otherwise provided in this section, while the proceeding is pending, the hearing officer shall not participate in any communications with any party, representative of a party, or any person who has a direct or indirect interest in the outcome of the proceeding about the subject matter or merits of the case at issue, without notice and opportunity of all parties, to participate in communication except a party that has been determined to be in default pursuant to §60065.38.*

*(b) No pleading, letter, document, or other writing shall be filed in a proceeding under these rules by a party unless service of a copy thereof together with any exhibit or attachment is made on all other parties to a proceeding. Service shall be in a manner as prescribed in section 60065.5.*

*(c) For the purpose of this section, a proceeding is pending from the time of issuance of the complaint under this article.*

*(d) Communications prohibited under paragraph (a) do not include communications concerning matters of procedure or practice, including requests for continuances that are not in controversy. It also does not prohibit communications between a party and the hearing officer when the opposing party has had a default entered pursuant to § 60065.38.*

*(e) A communication that would otherwise be prohibited by this section from an employee of the state board to the hearing officer is permissible if such employee has not served as an investigator, prosecutor, or advocate in the proceeding or its preadjudicative stage, and the purpose of the communication is to assist and advise the hearing officer in the initial determination of whether a document is a confidential business record (i.e., trade secrets) and reviewing the evidence in the record and drafting a decision or order. In carrying out these functions, the employee of the state board shall not furnish, augment, diminish, or modify the evidence in the record.*

*NOTE: Authority cited: Sections 39600, 39601, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 43105, 43028 and 43031(a), Health and Safety Code; Sections 11430.70 - 11430.80, Government Code.*

**§ 60065.14. Disclosure of Communication.**

*(a) If, while the proceeding is pending, but before serving as hearing officer, the hearing officer receives a communication of a type that would be in violation of this subarticle if received while serving as hearing officer, he or she shall, promptly after starting to serve, disclose the content of the communication on the record and give all parties an opportunity to address it as provided below.*

*(b) If a hearing officer receives a communication in violation of this article, the hearing officer shall make all of the following a part of the record in the proceeding:*

*(1) If the communication is written, the writing and any written response of the hearing officer to the communication; and*

*(2) If the communication is oral, a memorandum stating the substance of the communication, any response made by the hearing officer, and the identity of each person from whom the hearing officer received the communication.*

*(c) The hearing officer shall notify all parties that a communication described in this section has been made a part of the record.*

*(d) If a party requests an opportunity to address the communication within ten days after receipt of notice of the communication:*

*(1) The party shall be allowed to comment on the communication; and*

*(2) The hearing officer has discretion to allow the party to present evidence concerning the subject of the communication, including discretion to reopen a hearing that hearing having been concluded.*

*(e) Receipt of ex parte communications may be cause for disqualification of the hearing officer.*

*NOTE: Authority cited: Sections 39600, 39601, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 43105, 43028 and 43031(a), Health and Safety Code; Sections 11340.1 - 11340.5, Government Code.*

**§ 60065.15. Applicability to Executive Officer.**

*(a) The provision of Subarticle 3 governing ex parte communications to the hearing officer also governs ex parte communications with the executive officer on matters that may come before him or her pursuant to Subarticle 9.*

*(b) Except as provided in Subarticle 10 while a proceeding is pending, the hearing officer shall have no communication, direct or indirect, with the executive officer regarding the merits of regarding the merits of any issue in the proceeding.*

*NOTE: Authority cited: Sections 39600, 39601, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 43105, 43028 and 43031(a), Health and Safety Code; Sections 11430.70 - 11430.80, Government Code.*

**Subarticle 4. Issuance of and Response to Complaints**

**§ 60065.16. Violations Subject to a Complaint; Issuance.**

*(a) A complaint may be issued if:*

*(1) The violation alleged arises under Part 5 of the Health and Safety Code, or any rule, regulation, permit, variance, or order of the state board, pertaining to fuel requirements and standards;*

*(2) The state board has determined that the alleged violations is not a Class I violation that is subject to a citation under Title 13, California Code of Regulations, Article 5, section 60075.1, et seq.; and*

*(3) The penalty for each violation does not exceed \$25,000 for any day of violation and the total penalty for all violation's alleged in a complaint does not exceed \$300,000.*

*(b) A complaint shall include:*

*(1) The names of each respondent alleged to have committed a violation(s) covered under this article;*

*(2) A statement of the facts, in ordinary and concise language, that specifically identifies the statutes and/or rules alleged to have been violated and the acts or omissions of the respondents that constitute the alleged violation(s). The statement shall be specific enough to afford the named respondents notice and information in which to prepare a defense;*

*(3) A proposed penalty that complainant seeks for the alleged violations committed;*

*(4) Reference to these procedures, and notification that a copy of the procedures are available from the ARB hearing office, the address and phone number of which shall be designated, and that Chapter 5 (commencing with section 11500) of the Government Code is not applicable to these proceedings);*

*(5) Written notice to the respondent that, within 30 days from the date of service, it may respond to the allegations of the complaint and request a hearing. It shall also inform the respondent of the consequences of failing to respond by the applicable deadline;*

*(6) Written notice to the respondent that it has under the hearing procedures the right to counsel; and, if necessary, the right to an interpreter; or*

*(7) The address of the office issuing the complaint; the address to which payment of the proposed penalty may be sent; and the address of the hearing office to whom a request for a hearing shall be submitted.*

*(c) A complaint shall be served on the named respondent(s) by either personal service or certified mail.*

*Note: Authority cited: Sections 39600, 39601, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 43105, 43028 and 43031(a), Part 5, Health and Safety Code; Sections 60075.1, et seq., Title 13, California Code of Regulations.*

**§ 60065.17. Withdrawal of or Amendment to the Complaint.**

*(a) The complainant may without prejudice withdrawal or amend the complaint once as a matter of right at any time before respondent has filed its response.*

*(b) After the response has been filed, the complainant may move to withdraw or amend the complaint. A motion to amend the complaint must include the proposed amendment. The hearing officer may grant the motion upon finding that good cause exists and that the amendment is in the interest of justice.*

*Note: Authority cited: Sections 39600, 39601, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 43105, 43028 and 43031(a), Health and Safety Code.*

**§ 60065.18. Response to Complaint by Respondent.**

*(a) Within 30 days after service of the complaint, the respondent or counsel for the respondent may file a response to the complaint with the hearing office, in which the respondent may:*

*(1) Object to the complaint on the ground that it does not state acts or omissions upon which the agency may proceed;*

*(2) Object to the form of the complaint on the ground that it is so indefinite or uncertain that the respondent cannot identify the transaction or prepare a defense;*

*(3) Admit or deny the complaint, in whole or in part, specifying each allegation of fact or conclusion of law as to liability which is in dispute;*

*(4) Present new matters by way of affirmative defenses; or*

*(5) Oppose or agree to pay the penalty amount proposed in the complaint.*

*(b) The time period for response may be extended:*

*(1) By stipulation of the parties for 30 additional days to allow the parties to conduct informal settlement negotiations; or*

*(2) At the discretion of the hearing officer, for a period of up to 60 days, if the respondent can show good cause and if the complainant is not prejudiced by such a delay.*

*(c) Each uncontested allegation in the complaint shall be deemed admitted by the respondent.*

*(d) If the respondent fails to respond to the complaint in the time periods provided in this section, the matter shall be considered a default, pursuant to section 60065.41 and the respondent shall be considered to have waived his or her right to appear in the matter covered by the complaint.*

*(e) If a complaint is amended prior to the time respondent's response was due under subparagraph (a), respondent shall have 15 additional days from the date of service of the amended complaint to file the response.*

*(f) The respondent may move to amend its response to the complaint. Such motion must include language of the proposed amendment. The hearing officer may grant the motion upon finding that good cause exists and that the amendment is in the interest of justice.*

*Note: Authority cited: Sections 39600, 39601, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 43105, 43028 and 43031(a), Health and Safety Code.*

#### **§ 60065.19. Issues for Hearing.**

*The issues for hearing shall be limited to those raised in the complaint or amended complaint and the response or amended response.*

*Note: Authority cited: Sections 39600, 39601, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 43105, 43028 and 43031(a), Health and Safety Code.*

#### **§ 60065.20. Cease and Desist Orders; Stays Pending Hearing.**

*If the ARB enforcement staff has issued a cease and desist order against the respondent for alleged violations set forth in the complaint, the respondent may request a stay pending hearing from the hearing officer. The hearing officer may grant a stay pending issuance of a hearing officer decision under section 60065.39, unless the hearing officer finds that the adverse effects of a stay on the public health, safety and welfare outweigh the harm to those persons directly affected by the lack of a stay. The hearing officer may conduct a hearing or request such submissions by the parties as necessary to obtain information to make a determination on this issue.*

*Note: Authority cited: Sections 39600, 39601, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 43105, 43028 and 43031(a), Health and Safety Code.*

## ***Subarticle 5. Prehearing Procedures***

### **§ 60065.21. Scheduling of Hearings.**

*(a) Upon issuance of a complaint, the state board shall refer the matter to the administrative hearing office of the state board for assignment of a hearing officer. The hearing office shall assign an administrative law judge from the hearing office to hear the matter, unless staffing and other resources of the hearing office would prevent timely consideration of the matter. If the resources of the administrative hearing office prevent assignment, the administrative hearing office shall refer the matter to the OAH for assignment.*

*(b) The hearing office shall as expeditiously as possible, but no later than 30 days after issuance of the complaint, assign the matter to a hearing officer and schedule the hearing on the merits of the complaint. Except as provided in paragraph (f), below, a hearing on the merits of a complaint, in general, be scheduled to be heard no later than 180 days from the date of issuance of the complaint or from receipt of the petition for review, unless the hearing officer determines, for good cause, that a later hearing date is necessary and in the interest of justice.*

*(c) The hearing office shall deliver or mail a notice of hearing to all parties at least 30 days prior to the hearing. The notice shall be in the form specified in section 11509 of the Government Code, and shall also provide notice of the availability of interpreters pursuant to section 60065.10 of these rules.*

*(d) The hearing officer shall grant such delays or continuances as may be necessary or desirable in the interest of fairly resolving the case.*

*(1) The hearing officer may, on his or her own motion or upon request of any party accompanied by a showing of good cause, continue a hearing to another time or place.*

*(2) A party shall apply to the hearing officer for a continuance not less than five days prior to the scheduled hearing.*

*(3) When a continuance is ordered during a hearing, the hearing officer shall give written notice of the time and place of the continued hearing.*

*(e) The hearing office shall set the place of hearing at a location as near as practicable to the place where the respondent resides or maintains a place of business in California. If the respondent does not reside or maintain a place of business in California, the hearing shall be in Sacramento. The hearing office may establish hearing locations anywhere in the state; at a minimum one hearing location shall be established in Sacramento and one in the Los Angeles area.*

*(f) Upon the motion of any party and a showing of good cause, or upon the motion of the hearing officer, and in the absence of an objection from any party, the hearing officer may exercise discretion to conduct all or part of a hearing by telephone.*

*(1) In granting such a motion, the hearing officer must be assured that each participant in the hearing has an opportunity to participate in and to hear the entire proceeding while it is taking place and to observe all exhibits fully.*

*(2) The hearing officer may direct the party who has requested the alternative method to make the necessary arrangements and be responsible for any associated costs.*

*NOTE: Authority cited: Sections 39600, 39601, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 43105, 43028 and 43031(a), Health and Safety Code; Sections 11509 and 11440.30, Government Code.*

**§ 60065.22. Motion to Intervene.**

*(a) A person may file a motion to intervene, and the hearing officer may grant such a motion if all of the following conditions are satisfied:*

*(1) The motion is in writing, with copies served on all parties named in the complaint or the petition for review.*

*(2) The motion is made as early as practicable prior to the prehearing conference, if one is held, or the first day of the hearing on the merits of the complaint or petition for review.*

*(3) The motion states facts demonstrating that the requesting intervenor's legal rights, duties, privileges, or immunities will be substantially affected by the proceeding or that it qualifies as an intervenor under a statute or regulation.*

*(4) The hearing officer determines that the interests of justice and the orderly and prompt conduct of the proceeding will not be impaired by allowing the intervention.*

*(b) If motion is granted, the hearing officer may impose conditions on the intervenor's participation in the proceeding, either at the time that intervention is granted or at a later time. Conditions may include:*

*(1) Limiting the intervenor's participation to designated issues in which the intervenor has a particular interest demonstrated by the motion.*

*(2) Limiting or excluding the use of discovery, cross-examination, and other procedures involving the intervenor so as to promote the orderly and prompt conduct of the proceeding.*

*(3) Requiring two or more intervenors to combine their presentations of evidence and argument, cross-examination, discovery, and other participation in the proceeding.*

*(4) Limiting or excluding the intervenors's participation in settlement negotiations.*

*(c) The hearing officer shall issue an order granting or denying the motion for intervention as soon as practicable in advance of the hearing, briefly stating the reasons for the order and specifying any conditions that he or she has determined as appropriate. The hearing officer may modify the order at any time, stating the reasons for the modification. The hearing officer shall promptly give notice of any order granting, denying, or modifying intervention to the applicant and to all parties.*

*(d) Whether the interests of justice and the orderly and prompt conduct of the proceedings will be impaired by allowing intervention is a determination to be made at the sole discretion of the hearing officer, based upon his or her knowledge and judgment. The determination is not subject to administrative or judicial review.*

*NOTE: Authority cited: Sections 39600, 39601, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 43105, 43028 and 43031(a), Health and Safety Code; Section 11440.50, Government Code.*

**60065.23. Consolidation, Separation of Proceedings.**

*(a) Upon the motion of a party or upon the hearing officer's own motion, the hearing officer may consolidate for hearing and decision:*

*(1) Any number of proceedings involving the same respondent or petitioner; and*

*(2) Any number of proceedings involving common issues of law or fact where consolidation would expedite and simplify consideration of the issues and would not adversely affect the rights of the parties.*

*(b) Upon the motion of a party or upon the hearing officer's own motion, the hearing officer may, in furtherance of convenience or to avoid prejudice or when separate hearings will be conducive to expedition and economy, order a separate hearing of any issue, including an issue raised in the notice of defense, or of any number of issues.*

*NOTE: Authority cited: Sections 39600, 39601, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 43105, 43028 and 43031(a), Health and Safety Code.*

***§60065.24. Prehearing Conference.***

*(a) In any action in which the respondent timely responds pursuant to section 60065.18, or a petition for review has been scheduled for hearing, the hearing officer may require a prehearing conference upon his or her own order or the request of any party. A request for a prehearing conference shall be in writing, addressed to the hearing officer and served on all parties.*

*(b) A prehearing conference shall be held no later than 30 days after an order of the hearing officer or a request by a party, but no later than 90 days from the date of respondent's filing of the response or receipt of the petition for review.*

*(c) The hearing officer may conduct the conference in person or by telephone.*

*(d) At least ten business days before a scheduled conference, each party shall file with the hearing office and serve on all other parties a prehearing conference statement which shall contain the following information:*

*(1) Identification of all operative pleadings by title and date signed;*

*(2) The party's current estimate of time necessary to try the case;*

*(3) The name of each witness the party may call at hearing along with a brief statement of the content of the witness's expected testimony;*

*(4) The identity of any witness whose testimony will be presented by affidavit pursuant to section 60065.29, if known;*

*(5) The name and address of each expert witness the party intends to call at hearing along with a brief statement of the opinion the expert is expected to give. The party shall also attach a copy of a current resume for each expert witness;*

*(6) Whether there is need for an interpreter or special accommodation at the hearing;*

(7) A list of the documentary exhibits the party intends to present at hearing and a description of any physical or demonstrative evidence; and

(8) A concise statement of any legal issues which may affect the presentation of evidence or the disposition of the case.

(9) If the matter is a complaint proceeding, the complainant shall specify the proposed penalty and state the basis for that penalty. The respondent shall provide all factual information it considers relevant to the assessment of a penalty.

(e) At the prehearing conference the hearing officer may:

(1) Establish a time and place for further proceedings in the action, but no hearing on the merits of the action shall take place sooner than 30 days following the date of the prehearing conference;

(2) Attempt to simplify issues and help the parties to stipulate to facts not in dispute;

(3) Explore the necessity or desirability of amendments to the pleadings; and

(4) Discuss any other appropriate subject.

(f) After the prehearing conference, the hearing officer shall issue a prehearing order which incorporates the matters determined at the conference. This order may be issued orally if an accurate record can be made. Agreement on the simplification of issues, amendments, stipulations, or other matters may be entered on the record or may be made the subject of a written order by the hearing officer. If no matters were determined or dates set at the prehearing conference, a prehearing order is not required. The hearing officer may, to aid the efficient administration of justice, modify the prehearing order as necessary.

*Note: Authority cited: Sections 39600, 39601, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 43105, 43028 and 43031(a), Health and Safety Code.*

#### **§60065.25. Settlement Agreements and Consent Orders.**

(a) At any time before a final decision of the hearing officer, the complainant and the respondent may settle an action, in whole or in part, by agreeing upon a civil penalty, with or without conditions.

*(b) The parties may request the assistance of the hearing office in their attempts to settle the matters at issue. Upon receiving such a request, the hearing office may assign a settlement hearing officer, who is not the same hearing officer that has been assigned, to hear the merits of the case, unless the parties specifically request in writing the assignment of the latter hearing officer.*

*(c) The parties shall memorialize any agreement in writing.*

*(d) In a complaint proceeding, the hearing officer assigned to hear the merits of the case, shall thereafter enter a consent order in accordance with the terms of the settlement agreement. Such consent order is not subject to further review by the agency or a court.*

*(e) In a petition for review proceeding, if the parties resolve all issues raised by the petition, the petitioner shall agree to withdraw the petition and the case shall be dismissed.*

*(f) If the filing of the consent order pursuant to paragraph (d) of this section or the settlement in the petition for review proceeding does not wholly conclude the action, the hearing officer assigned to hear the merits of the case shall promptly inform the parties of the schedule of the remaining proceedings.*

*(g) Unless the parties have otherwise consented to use the hearing officer assigned to hear the merits of the case in settlement discussions, settlement discussions or offers of compromise regarding unresolved issues shall not be discussed with that hearing officer. Settlement discussions or offers of compromise shall also not be made part of the record of the proceedings.*

*Note: Authority cited: Sections 39600, 39601, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 43105, 43028 and 43031(a), Health and Safety Code; Section 11415.60, Government Code.*

#### **§ 60065.26. Discovery.**

*(a) The provisions of this section provide the exclusive right to, and method of, discovery as to any proceeding governed by these hearing procedures. However, nothing in this section prohibits the parties from voluntarily stipulating to provide discovery deemed appropriate. This section does not authorize the inspection or copying of, any writing, or thing which is privileged from disclosure by law or protected as part of an attorney's work product.*

*(b) The names and addresses of witnesses; inspection and copying of documents and things.*

*(1) Unless otherwise stipulated to by the parties, within 45 days of issuance of a complaint or amended complaint, a party may request:*

*(A) The names and addresses of witnesses to the extent known to the other party, including, but not limited to, those intended to be called to testify at the hearing; or*

*(B) The opportunity to inspect and make a copy of any thing, document, statement or other writings relevant to the issues for hearing that are in the possession, custody or control of the other party and would be admissible in evidence. This includes the following information from inspection or investigative reports prepared by, or on behalf of, any party that pertain to the subject matter of the proceeding: (i) the names and addresses of witnesses or of persons (other than confidential informants) having personal knowledge of the issues involved in the proceeding, (ii) matters perceived by the investigator in the course of his or her investigation (as opposed to his or her analysis or conclusions), and (iii) statements related to the issues of the proceedings which are otherwise admissible.*

*(2) Parties shall arrange a mutually convenient time for the exchanging of the names and addresses of witnesses and the inspecting and copying of relevant things, documents, statements, and other writings identified in subparagraph (B) above, but such date shall not be later than 30 days from the date of receipt of the request made pursuant to subparagraph (b)(1). Unless other arrangements are made, the party requesting the writings shall pay for the copying.*

*(3) All requests under subparagraph (b) are continuing, and the party receiving the request shall be under a continuing duty to provide the requesting party with the information requested.*

*(4) Absent a stipulation between the parties, a party claiming that certain writings or things are privileged against disclosure shall, within 15 days of receipt of the request for inspection and copying, serve on the requesting party a written statement setting forth what matters it claims are privileged and the reasons supporting its claims.*

*(c) Other Discovery.*

*(1) A party may file a motion requesting that the hearing officer order further discovery. The motion shall specify the proposed method of discovery to be used and shall include affidavits describing in detail the nature of the information and/or documents sought, the proposed time and place of the discovery (if applicable), and the information addressing the findings listed in subparagraphs (A)-(D) below. The hearing officer shall grant the motion upon finding that:*

*(A) The additional discovery will not unreasonably delay the proceedings;*

*(B) The information to be obtained from the discovery is most reasonably obtained from the non-moving party, who has refused to provide it voluntarily; or that*

*(C) The information to be obtained is relevant and has significant probative value on a disputed issue of material fact regarding the issue liability or the relief sought.*

*(2) The hearing officer may order the taking of oral depositions only under the following circumstances:*

*(A) After affirmatively making the findings in subparagraphs (c)(2)(A)- (C), and further finding that the information sought cannot be obtained by alternative methods; or*

*(B) There is substantial reason to believe that relevant and probative evidence may otherwise not be preserved for presentation by a witness at the hearing.*

*(3) If the hearing officer grants the motion for the taking of a deposition, the moving party shall serve notice of the deposition on the person to be deposed with copies served on the other parties at least ten days before the date set for the deposition.*

*(4) Where the witness resides outside of the state and where the hearing officer has ordered the taking of the testimony by deposition, the hearing officer shall obtain an order of the court to that effect by filing a petition in the superior court in Sacramento County. The proceedings for such a hearing shall be in accordance with the provisions of Government Code section 11189.*

*(d) Protective Orders:*

*(1) Upon motion by a party or by the person from whom discovery is sought, or by the hearing officer on his or her own motion, the hearing officer may enter a protective order with respect to this material.*

*(2) Prior to granting a protective order, it must be established by the moving party that the information sought to be protected is entitled to be treated as a trade secret or is otherwise confidential. A party or person seeking a protective order shall have the opportunity to be heard on all issues relevant to preserving the record's confidentiality, including, but not limited to, the following:*

*(A) The appropriate scope and terms of any governing protective order;*

*(B) The terms under which the record may be placed in evidence or otherwise used at a hearing; and*

*(C) The disposition of the record and any copies thereof after all relevant administrative and judicial proceedings have concluded.*

(3) A party or person seeking a protective order may be permitted to make all, or part of, the required showing in a closed meeting. The hearing officer shall have discretion to limit attendance at any closed meeting proceeding to the hearing officer and the person or party seeking the protective order.

(4) A protective order, if granted, shall contain terms governing the treatment of the information which are appropriate under the circumstances to prevent disclosure outside the hearing. The protective order may order that the trade secret information not be disclosed or that it be disclosed only to specified persons, or in a specified way. Disclosure may be limited to counsel for the parties who shall not disclose such information to the parties themselves. Disclosure to specified persons shall be conditioned on execution of sworn statements that no disclosure of the information will be made to persons not entitled to receive it under the terms of the protective order.

(5) The protective order shall contain terms governing the treatment of the information which are appropriate under the circumstances to prevent disclosure outside the hearing; the order may require that the material be kept under seal and filed separately from other evidence and exhibits in the hearing.

(6) Any party subject to the terms and conditions of any protective order, desiring to make use of any documents or testimony obtained in a closed meeting, shall file a motion to the hearing officer and set forth justification for the request. The motion shall be granted upon a demonstration of good cause that the information is relevant and has significant probative value on a disputed issue of material fact in issue. In granting the motion, the hearing officer shall enter an order protecting the rights of the affected persons and parties, who have claimed that the information is confidential, by preventing any unnecessary disclosure of the information. The hearing officer may require that the information be presented in a closed meeting, with attendance limited, as necessary and practicable, to specified representatives of the parties and that the material be sealed and filed separately from other evidence and exhibits in the hearing.

(7) The hearing office shall make a record of all closed meetings that are held under this section. The record shall be sealed and made available, upon appropriate order, to the executive officer, on reconsideration, or to the court on review.

(8) If the hearing officer denies a motion for protective order or grants a protective order only, in part, the order shall not become effective until ten days after the date the order is served. In the interim, a party to the proceeding or third-party holder of the asserted confidential information adversely affected by the order may seek appropriate interlocutory relief in a court of competent jurisdiction.

(e) *Proceeding to Compel Discovery.*

*(1) Any party claiming that its request for discovery pursuant to this section has not been complied with or that the opposing party has failed to comply with a stipulated agreement to provide discovery may serve and file with the hearing officer a motion to compel the party who has refused or failed to produce the requested or stipulated discovery to comply. The motion shall include the following:*

*(A) Facts showing the party has failed or refused to comply with a discovery request or stipulation;*

*(B) A description of the information sought to be discovered;*

*(C) The reasons why the requested information is discoverable;*

*(D) Evidence that a reasonable and good faith attempt to contact the noncomplying party for an informal resolution of the issue has been made; and*

*(E) To the extent known by the moving party, the measures for the noncomplying party's refusal to provide the requested information.*

*(2) The motion shall be filed within 15 days after the date the requested information was to be made available for inspection and copying or the date a deposition was scheduled to take place and served upon the party who has failed or refused to provide discovery.*

*(3) The hearing on the motion to compel discovery shall be held within 15 days after the motion is filed, or a later time that the hearing officer may on his or her own motion for good cause determine. The party who has refused or failed to provide discovery shall have the right to serve and file a written answer or other response which shall be due at the hearing office and personally served on all parties at least three days prior to the date set for hearing.*

*(4) Where the matter sought to be discovered is under the custody or control of the party who has refused or failed to provide discovery and that party asserts that the matter is not a discoverable matter under this section, or is privileged against disclosure, the hearing officer may order that the party in custody lodge with the hearing office the matters identified in subdivision (b) of section 915 of the Evidence Code and the hearing officer shall examine the matters in accordance with those provisions.*

*(5) The hearing officer shall decide the case on the matters examined in a closed meeting, the papers filed by the parties, and such oral argument and additional evidence as the hearing officer may allow.*

(6) *Unless otherwise stipulated by the parties, the hearing officer shall no later than 15 days after the hearing make its order denying or granting the motion. The order shall be in writing setting forth the matters the moving party is entitled to discover. The hearing office shall serve a copy of the order by mail upon the parties. Where the order grants the motion in whole, or in part, the order shall not become effective until ten days after the date the order is served. Where the order denies relief to the moving party, the order shall be effective on the date it is served.*

(7) *If after receipt of an order directing compliance with the provisions of these rules regarding discovery, a party fails, without good cause, to comply with the order, the hearing officer may draw adverse inferences against that party and may prevent that party from introducing any evidence that had been requested and not produced during discovery into the administrative record.*

*NOTE: Authority cited: Sections 39600, 39601, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 43105, 43028 and 43031(a), Health and Safety Code; Sections 11189 and 11507.6, Government Code; Section 915(b), Evidence Code.*

**§60065.27. Subpoena and Subpoena Duces Tecum.**

(a) *Subpoenas and subpoenas duces tecum may be issued for attendance at a hearing and for production of documents at any reasonable time and place or at a hearing.*

(b) *Subpoenas and subpoenas duces tecum shall be issued by the hearing officer assigned to a proceeding, general counsel, or executive officer at the request of a party or, if represented by an attorney, the attorney of record for a party in accordance with sections 1985-1985.4 of the California Code of Civil Procedure.*

(c) *The custodian of documents that are the subject of a subpoena duces tecum may satisfy the subpoena by delivery of the documents or a copy of the documents, or by making the documents available for inspection or copying, together with an affidavit in compliance with section 1561 of the Evidence Code.*

(d) *The process extends to all parts of the state and shall be served in accordance with sections 1987 and 1988 of the California Code of Civil Procedure. A subpoena or subpoena duces tecum may also be delivered by certified mail return receipt requested or by messenger. Service by messenger shall be effected when the witness acknowledges receipt of the subpoena to the sender, by telephone, by mail, or in person, and identifies himself or herself either by reference to date of birth and driver's license number or Department of Motor Vehicles identification number, or the sender may verify receipt of the subpoena by obtaining other*

*identifying information from the recipient. The sender shall make a written notation of the acknowledgment. A subpoena issued and acknowledged pursuant to this section has the same force and effect as a subpoena personally served. Failure to comply with a subpoena issued and acknowledged pursuant to this section may be punished as a contempt and the subpoena may so state. A party requesting a continuance based upon the failure of a witness to appear at the time and place required for the appearance or testimony pursuant to a subpoena, shall prove that the party has complied with this section. The continuance shall only be granted for a period of time that would allow personal service of the subpoena and in no event longer than that allowed by law.*

*(e) No witness is obliged to attend unless the witness is a resident of the state at the time of service.*

*(f) Upon timely motion of a party or witness, or upon his or her own motion, after notice to the parties and an opportunity to be heard and upon a showing of good cause, the hearing officer may order the quashing of a subpoena or subpoena duces tecum entirely, may modify it, or may direct compliance with it upon other terms or conditions. In addition, the hearing officer may make any other order as may be appropriate to protect a party or witness from unreasonable or oppressive demands.*

*(g) The state board may quash a subpoena or a subpoena duces tecum that it has issued on its own motion.*

*(h)(1) In the case of the production of a party to the record of a proceeding or of a person for whose benefit a proceeding is prosecuted or defended, the service of a subpoena on the witness is not required if written notice requesting the witness to attend, with the time and place of the hearing, is served on the representative of the party or person.*

*(2) Service of written notice to attend under this section shall be made in the manner and is subject to the conditions provided in section 1987 of the California Code of Civil Procedure for service of written notice to attend in a civil action or proceeding.*

*(i) A witness other than an employee of the state or a political subdivision thereof appearing pursuant to a subpoena or a subpoena duces tecum, other than a party, shall receive the same mileage, and appearance fees allowed by law; such fees are to be paid by the party at whose request the witness is subpoenaed.*

*NOTE: Authority cited: Sections 39600, 39601, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 43150, 43028 and 43031(a),*

*Health and Safety Code; Sections 11186 - 11188, 11450.05 - 11450.30, Government Code; Section 1561, Evidence Code, Sections 1985 - 1985.4, 1987 and 1988, California Code of Civil Procedure.*

**§ 60065.28. *Witness Lists.***

*(a) No later than ten days before the scheduled hearing date, the parties shall submit to the hearing office and serve upon the other parties, a list of the names, addresses and qualifications of proposed witnesses and a brief summary of the testimony to be presented by each witness.*

*(b) The hearing officer may prohibit any party from presenting any witness that has not been included on that party's witness list as required under paragraph (a) of this section.*

*NOTE: Authority cited: Sections 39600, 39601, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 43105, 43028 and 43031(a), Health and Safety Code.*

**§ 60065.29. *Motions for Summary Determination of Issues.***

*(a) Any party may file a motion for summary judgment or summary adjudication of the issues. Such motions shall include supporting legal argument, and where necessary, affidavits showing that there is no genuine issue of material fact for determination regarding the identified issues. A party opposing such a motion shall show by affidavit or other documentation that a genuine issue of material fact as to the issues raised exists. After reviewing the motion and response of the parties, the administrative record, and any arguments of the parties, the hearing officer shall determine whether a genuine issue of material fact as to the issues exists and whether a party is entitled to judgment on the issue(s) as a matter of law.*

*(b) If, upon considering a motion under subparagraph (c), the hearing officer determines that a party is entitled to summary judgment on the issue(s) as a matter of law, the hearing officer shall issue a written decision or order that sets forth necessary findings of fact and conclusions of law regarding all matters that were at issue. In a complaint proceeding, if the hearing officer decision finds the respondent to be in violation, the hearing officer shall follow the penalty assessment criteria set forth in section 60065.39.*

*(c) Should it appear from the affidavits of a party opposing the motion that the party cannot, for reasons stated, present by affidavit facts essential to justify the party's opposition, the hearing officer may deny the motion or may grant a continuance to permit affidavits to be obtained or to permit such additional discovery as provided under these procedures.*

*(d) The hearing officer shall deny a request for summary determination of the issue(s) if he or she finds the administrative record, including any evidence presented by the parties as part of this motion, present a genuine issue of material fact. If the hearing officer denies a request for summary determination, or denies such a request in part, the hearing officer shall promptly issue to each party a written ruling as to the existence of a genuine issue of material fact on the issue(s) and the reasons for the ruling. The matter shall continue to be set for hearing on all issues for which a genuine issue of material fact exists.*

*NOTE: Authority cited: Sections 39600, 39601, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 43105, 43028 and 43031(a), Health and Safety Code.*

### ***Subarticle 6. Contempt and Sanctions***

#### ***§ 60065.30. Contempt.***

*If any person in proceedings before the hearing officer disobeys or resists any lawful order or refuses to respond to a subpoena, subpoena duces tecum, or refuses to take the oath or affirmation as a witness or thereafter refuses to be examined, or is guilty of misconduct during a hearing or in its immediate vicinity as to obstruct the proceedings, the hearing officer may certify the facts to the Superior Court in and for the county where the proceedings are held for contempt proceedings pursuant to Government Code section 11455.20.*

*Note: Authority cited: Sections 39600, 39601, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 43105, 43028 and 43031(a), Health and Safety Code; Sections 11455 and 11525, Government Code.*

#### ***§ 60065.31. Sanctions.***

*(a) Notwithstanding the above, the hearing officer may order a party, a party's representative or both, to pay reasonable expenses, including attorney's fees, incurred by another party as a result of bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay.*

*(1) "Actions or tactics" include, but are not limited to, the making or opposing of motions; the failure to comply with a discovery request or subpoena; or the failure to comply with a lawful order of the hearing officer.*

*(2) "Frivolous" means:*

*(A) Totally and completely without merit, or*

*(B) For the sole purpose of harassing an opposing party.*

*(b) An order for sanctions may be oral on the record or in writing and shall set forth the factual findings which are the basis for the imposition of sanctions.*

*(1) In determining reasonable expenses, the party or parties to whom payment is to be made shall, at the hearing officer's discretion, either make a statement on the record under oath or submit a written declaration under penalty of perjury setting forth with specificity the expenses incurred as a result of the other party's conduct.*

*(2) Within five days of the receipt of the hearing officer's order for the payment of expenses, a party or representative may, on the ground of hardship, request reconsideration from the hearing officer issuing the order. The request for reconsideration shall be filed in writing, and include a declaration under penalty of perjury.*

*(c) The order or denial of an order to pay expenses under paragraph (b) is subject of procedural review in the same manner as a final decision pursuant to Subarticle 11.*

*Note: Authority cited: Sections 39600, 39601, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 43105, 43028 and 43031(a), Health and Safety Code; Sections 11455.30 and 11525, Government Code.*

#### ***Subarticle 7. Hearings***

##### ***§ 60065.32. Failure to Appear.***

*If after service of a Notice of Hearing, including Notice of Consolidated Hearing or Continuance, a party fails to appear at a hearing either in person or by representative, the hearing officer may take the proceeding off calendar, or may, at the request of a party, or on his or her own motion, issue a default order in a complaint proceeding in accordance with section 60065.38 of this article, or adversely rule against the absent party in a petition for review hearing.*

*NOTE: Authority cited: Sections 39600, 39601, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 43105, 43028 and 43031(a), Health and Safety Code.*

**§ 60065.33. Conduct of Hearing.**

*(a) The hearing shall be presided over by a hearing officer who shall conduct a fair and impartial hearing in which each party has a reasonable opportunity to be heard and to present evidence.*

*(b) The hearing shall be conducted in the English language.*

*(c) Subject to reasonable limitations that may be imposed by the hearing officer, each party to the proceeding shall have the right to:*

*(1) Call and examine witnesses;*

*(2) Introduce exhibits;*

*(3) Question opposing witnesses on any matter relevant to the issues even though that matter was not covered in the direct examinations;*

*(4) Impeach any witness regardless of which party first called the witness to testify; and*

*(5) Call and examine an opposing party as if under cross-examination, even if that party does not testify on his or her own behalf.*

*(d) Burden of Going Forth.*

*(1) The complainant shall have the initial burden of presenting evidence in support of issuance of the complaint, the requested penalty, and any other material that is pertinent to the issues to be determined by the hearing officer.*

*(2) At the conclusion of complainants case-in-chief, the respondent has the burden of presenting any defense to the allegations set forth in the complaint and any response or evidence with respect to the appropriate relief. The respondent has the right to examine, respond to, or rebut the allegations of the complaint and any proffered evidence and material. The respondent may offer any documents, testimony, or other exculpatory evidence which bears on appropriate issues, or may be relevant to the penalty amount.*

*(3) At the close of respondent's presentation of evidence, the parties respectively have the right to introduce rebuttal evidence that is necessary to resolve disputed issues of material fact, subject to any limits imposed by the hearing officer pursuant to subparagraph (e)(1) below.*

*(e) The hearing officer may:*

*(1) Limit the number of witnesses and the scope and extent of any direct examination, cross-examination, or rebuttal testimony, as necessary, to protect the interests of justice and conduct a reasonably expeditious hearing;*

*(2) Require the authentication of any written exhibit or statement;*

*(3) Call and examine a party or witness and may, on his or her own motion, admit any relevant and material evidence;*

*(4) Exclude persons whose conduct impedes the orderly conduct of the hearing;*

*(5) Restrict attendance because of the physical limitations of the hearing facility; or*

*(6) Take other action to promote due process or the orderly conduct of the hearing.*

*(f) The taking of evidence in a hearing shall be controlled by the hearing officer in the manner best suited to ascertain the facts and safeguard the rights of the parties. Prior to taking evidence, the hearing officer shall define the issues and the order in which evidence will be received.*

*(g) Each matter in controversy shall be decided by the hearing officer upon a preponderance of the evidence.*

*(h) Hearings shall be recorded electronically. The recording made by the Administrative Hearing Office shall be the official recording of the hearing*

*(1) A verbatim transcript of the official recording will not normally be prepared, but may be ordered by the hearing officer if deemed necessary to permit a full and fair review and resolution of the case. If not so ordered by the hearing officer, a party may, at its own expense, request that a verbatim transcript be made. The party making the request shall provide one copy to the hearing officer and one copy to every other party.*

*(2) The official recording of the hearing and transcript of the recording, together with all written submissions made by the parties, shall become part of the administrative record for the proceeding.*

*NOTE: Authority cited: Sections 39600, 39601, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 43028 and 43031(a), Health and Safety Code.*

**§ 60065.34. Evidence.**

*(a) Testimony shall be taken only under oath or affirmation.*

*(b) The hearing need not be conducted according to technical rules relating to evidence and witnesses. The hearing officer shall admit evidence which is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions, and which is not irrelevant, immaterial, unduly repetitious, or otherwise unreliable or of little probative value. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but upon timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. The application of these rules shall not affect the substantial rights of the parties as provided in the Evidence Code.*

*(c) The rules of privilege shall be effective to the extent that they are otherwise required by statute to be recognized at the hearing.*

*(d) Trade secret and other confidential information may be introduced into evidence. The hearing officer shall preserve the confidentiality of such information, and may make such orders as may be necessary to consider such evidence in a closed meeting, including the use of a supplemental order or decision to address matters which arise out of that portion of the evidence which is confidential.*

*(e) In reaching a decision, official notice may be taken, either before or after submission of the proceeding for decision, of any generally accepted technical or scientific matter within the state board's area of expertise, and determinations, rulings, orders, findings and decisions, required by law to be made by the hearing officer.*

*(1) The hearing officer shall take official notice of those matters set forth in section 451 of the Evidence Code.*

*(2) The hearing officer may take official notice of those matters set forth in section 452 of the Evidence Code.*

*(3) Each party shall give notice of a request to take official notice and be given reasonable opportunity on request to present information relevant to:*

*(A) The propriety of taking official notice; and*

*(B) The effect of the matter to be noticed.*

*NOTE: Authority cited: Sections 39600, 39601, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 43105, 43028 and 43031(a), Health and Safety Code; Sections 451, 452, Evidence Code.*

**§ 60065.35. Evidence by Affidavit or Declaration.**

*(a) At any time ten or more days prior to a hearing or a continued hearing, a party may mail or deliver to the opposing party or parties a copy of any affidavit or declaration which the proponent proposes to introduce in evidence, together with a notice as provided in subdivision (b). Unless an opposing party, within seven days after such mailing or delivery, mails or delivers to the proponent a request to cross-examine the affiant or declarant the opposing party's right to cross-examine such affiant or declarant is waived and the affidavit or declaration, if introduced in evidence, shall be given the same effect as if the affiant or declarant had testified orally. If an opportunity to cross-examine an affiant or declarant is not afforded after request therefore is made as herein provided, the hearing officer may allow the affidavit or declaration to be introduced, but if it is allowed to be introduced, it shall only be given the same effect as other hearsay evidence.*

*(b) The notice referred to in subdivision (a) shall be in the following form:*

*"The accompanying affidavit or declaration of [insert name of affiant or declarant] will be introduced as evidence at the hearing in [insert title and docket number or petition number of proceeding]. [Insert name] will not be called to testify orally and you will not be entitled to question the affiant or declarant unless you notify [insert name of the proponent, representative, agent or attorney] at [insert address] that you wish to cross-examine the affiant or declarant. To be effective, your request must be mailed or delivered to [insert name of proponent, representative, agent or attorney] on or before [insert a date 7 days after the date of mailing or delivery of the affidavit to the opposing party]."*

*NOTE: Authority cited: Sections 39600, 39601, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 43105, 43028 and 43031(a), Health and Safety Code.*

**§ 60065.36. Exclusion of Witnesses.**

*Upon motion of a party, the hearing officer may exclude from the hearing room any witnesses not at the time under examination; but the parties or their representatives to the proceeding shall not be excluded.*

*NOTE: Authority cited: Sections 39600, 39601, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 43105, 43028 and 43031(a), Health and Safety Code.*

**§ 60065.37. Oral Argument and Briefs.**

*(a) Prior to the close of the hearing, the hearing officer may, on his or her own motion, or upon motion of a party, grant and determine the length of oral argument.*

*(b) Motions to submit written closing argument shall be made prior to the close of the hearing and shall be granted at the discretion of the hearing officer upon a determination that written argument will be productive and will not unreasonably delay the disposition of the proceeding. The hearing officer shall determine the appropriate page lengths of all post hearing briefs at the time he or she determines that the filing of closing arguments is appropriate. A party shall file written closing brief within 15 working days from the date of the hearing. Opposing parties may file a reply brief within 10 working days from service of the argument. The hearing officer may extend or reduce the above filing dates for submission of written argument for good cause.*

*NOTE: Authority cited: Sections 39600, 39601, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 43105, 43028 and 43031(a), Health and Safety Code.*

**Subarticle 8. Decisions of the Hearing Officer**

**§60065.38. Default Order.**

*(a) Upon motion, the hearing officer may find a party to be in default upon failure, without good cause to file a timely response to the complaint as required under section 60065.18; to appear at a scheduled conference or hearing; or to comply with an order of the hearing officer.*

*(b) For purposes of a pending complaint action,*

*(1) A default by Respondent shall constitute an admission of all facts alleged in the complaint and a waiver of respondent's right to a hearing of the factual allegations.*

*(2) A default by complainant shall constitute a waiver of complainant's right to proceed on the merits of the action, and shall result in the dismissal of the complaint with prejudice.*

(c) *No finding of default shall be made against the respondent unless the complainant presents sufficient evidence to establish a prima facie showing that the start board and the hearing officer had jurisdiction over the matters at issue and that the complaint was properly served.*

(d) *Within 10 days, the complainant shall present written evidence, supported by affidavits or declarations explaining the proposed penalty set forth in the complaint.*

(e) *Any proceeding may be reinstated by the hearing officer upon a showing of good cause that contains sufficient facts to show or establish a reasonable basis for the failure to appear at the hearing. The request for reinstatement shall be made by the defaulting party within 30 days of service of the default order.*

*NOTE: Authority cited: Sections 39600, 39601, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 43105, 43028 and 43031(a), Health and Safety Code.*

**§60065.39. Order or Decision of the Hearing Officer after a Complaint Hearing; Rehearing.**

(a) *Unless otherwise ordered, all complaint proceedings shall be submitted at the close of the hearing unless otherwise extended by the hearing officer or provided in these rules. Within a reasonable period of time after the proceeding is submitted, the hearing officer shall make findings upon all facts relevant to the issues for hearing, and file an order or decision with the reasons or grounds upon which the order or decision was made.*

(b) *The order or decision shall be in writing, signed and dated by the hearing officer deciding the proceeding.*

(c) *The order or decision may, based on the findings of fact, affirm, modify or vacate the alleged violations set forth in the complaint or the proposed penalty, or direct other relief as applicable.*

(d) *A copy of the order or decision shall be served on each party or representative together with a statement informing the parties of their right to petition the executive officer, for reconsideration of the order or decision pursuant to section 60065.41 of these rules.*

(e) (1) *Within five days of the filing of any order or decision, the hearing officer may, at the request of any party or on his or her own motion, on the basis of mistake of law or fact, issue a modified order or decision correcting a mistake or error with respect to any matters determined or covered by the previously issued order or decision. If necessary, the hearing officer may schedule further proceedings to address the issue(s).*

*(2) If a request has been filed under this subparagraph, the request shall be deemed denied if the hearing officer has taken no action to address the request within 15 days of filing of the request.*

*(3) The hearing office shall serve a copy of any modified order or decision on each party that had previously been served with the original order or decision.*

*(f) The hearing officer shall certify the administrative record and shall make available copies of the administrative record and any issued orders or decisions to the executive officer.*

*(g) The order or decision or modified order or decision of the hearing officer shall become effective 20 days after it has been served on the respondent, unless the executive officer, on his or her own motion, issues an order of reconsideration or grants a further stay, or a request for reconsideration has been filed by a party pursuant to 60065.41. If a request for reconsideration has been filed, the effective date of the decision shall automatically be stayed for at least 20 additional days from the date of filing of the request for reconsideration.*

*NOTE: Authority cited: Sections 39600, 39601, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 43105, 43028 and 43031(a), Health and Safety Code.*

**§ 60065.40. Penalty Assessment Criteria.**

*In determining penalties for complaints issued under Health and Safety Code section 43028, the hearing officer shall consider all relevant circumstances, including, but not limited to:*

*(a) The extent of harm caused by the violation to public health and safety and to the environment;*

*(b) The nature and persistence of the violation, including the magnitude of the excess emissions;*

*(c) The compliance history of the respondent, including the frequency of past violations;*

*(d) The preventive efforts taken by respondent, including the record of maintenance and any program to ensure compliance;*

*(e) The innovative nature and the magnitude of the effort required to comply, and the accuracy, reproducibility, and repeatability of the available test methods;*

*(f) The efforts to attain, or provide for, compliance;*

(g) *The cooperation of the respondent during the course of the investigation and any action taken by the defendant, including the nature, extent, and time of response of any action taken to mitigate the violation; and*

(h) *For the person who owns a single retail service station, the size of the business.*

*NOTE: Authority cited: Sections 39600, 39601, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 43028, 43031(a) and 44011.6, Health and Safety Code.*

### ***Subarticle 9. Reconsideration***

#### ***§ 60065.41. Reconsideration by Executive Officer.***

(a) *A party aggrieved by an order or decision of a hearing officer in a complaint proceeding pursuant to section 60065.39 of these rules may, within 20 days of service of such order or decision, request that the executive officer reconsider the hearing officer decision with respect to any matters covered by the order or decision. The request for reconsideration shall be filed with the executive officer and shall be served on all parties and the hearing office. The request shall be deemed filed the date it is delivered or mailed to the executive officer.*

(b) *Within 20 days of issuance of an order or decision by a hearing officer in a complaint proceeding pursuant to section 60065.39 of these rules, the executive officer may, on his or her own motion, decide to order reconsideration of the order or decision of the hearing officer. The executive officer shall notify the parties and the hearing office of this decision.*

*Note: Authority cited: Sections 39600, 39601, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 43105, 43028 and 43031(a), Health and Safety Code.*

#### ***§60065.42. Requirements in Filing Request for Reconsideration; Comments Opposing Request.***

(a) *A request for reconsideration of a hearing officer order or decision shall be signed by the party or its representative and verified under oath. The request shall be based upon one or more of the following grounds:*

(1) *The hearing officer acted without or in excess of its powers;*

(2) *The order or decision was procured by fraud;*

*(3) The order or decision is not supported by the evidence or the findings of fact;*

*(4) The requesting party has discovered new material evidence that could not, with reasonable diligence, have been discovered and produced at the hearing; or*

*(5) The hearing officer has misapplied applicable law.*

*(b) Any request for reconsideration shall specifically detail the grounds upon which the requesting party considers the order or decision to be unjust or unlawful and every issue to be considered on reconsideration. The requesting party shall be deemed to have fully waived all objections, irregularities, and illegalities concerning the proceeding upon which reconsideration is sought other than those specifically set forth in the request for reconsideration. The request for reconsideration will be denied if it contains no more than allegations of the statutory grounds for reconsideration, unsupported by specific references to the record and principles of law involved.*

*(c) When a request for reconsideration or answer thereto has been timely filed, the filing of supplemental papers or answers may be granted at the discretion of the executive officer. Parties requesting a copy of the hearing record shall bear the cost of reproduction.*

*(d) The request for reconsideration may include a request that the order or decision of the hearing officer be stayed pending resolution of the request for reconsideration. As stated in section 60065.48, the order or decision shall be automatically stayed for 20 days from the date of filing of the request for reconsideration.*

*(e) Within ten days of being served with notice of a request for reconsideration, a party opposed to the request may file an opposition to the request with the executive officer. The opposition shall be signed and verified under oath by the party or its representative and shall not exceed 6 pages.*

*Note: Authority cited: Sections 39600, 39601, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 43105, 43028 and 43031(a), Health and Safety Code.*

***§60065.43. Decision on Reconsideration; Stays; Summary Denial.***

*(a) The executive officer may, upon request or upon his or her own motion, stay, suspend, or postpone the order or decision of the hearing officer while the request for reconsideration is pending.*

*(b) The executive officer shall be deemed to have summarily denied the request for reconsideration if he or she fails to act upon the request for reconsideration within 20 days from the date of filing of the request. The executive officer may, for good cause, extend the time within which the petition for reconsideration must be acted upon for a period not to exceed ten days. The executive officer shall issue an order notifying the parties of the decision to summarily deny the request for reconsideration*

*(c) Upon summary denial, the order or decision of the hearing officer filed pursuant to section 60065.39 shall become final.*

*(d) If the request for reconsideration has not been summarily denied pursuant to subparagraph (b) above, the executive officer may within 45 days after receipt of the request for reconsideration:*

*(1) Review some, but not all issues raised by the request;*

*(2) Delegate its review authority to one or more persons, subject or not subject to, further review by the executive officer;*

*(3) Affirm, rescind, or amend the findings and conclusions of law, order or decision of the hearing officer; or*

*(4) Direct the taking of additional evidence either by submission or further hearing.*

*(A) If the executive officer orders the parties to submit additional evidence, notice and an opportunity to respond shall be given to all parties.*

*(B) If the executive officer orders that additional evidence be taken at a further hearing conducted by the executive officer or the hearing officer and that additional findings of fact be made, notice of the time and place of the hearing shall be given to all parties and to such other persons that may be affected by the order.*

*(C) The issues on further hearing shall be limited to those set forth in the order issued under this section.*

*(D) The time limit in section 60065.42 of these rules for filing an order or decision shall not apply to further hearings during reconsideration.*

*NOTE: Authority cited: Sections 39600, 39601, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 43105, 43028 and 43031(a), Health and Safety Code; Section 1140.10, Government Code.*

## ***Subarticle 10. Final Order or Decision; Judicial Review***

### **§ 60065.44. Final Order or Decision; Effective Date.**

*(a) If no request for reconsideration of a hearing officer's order or decision is filed within 20 days of the service of an order or decision, and no reconsideration has been ordered by the executive officer on his or her own motion the order or decision of the hearing officer shall become final. The effective date of the final order or decision shall be 20 days from the date of service of the hearing officer order or decision on the parties.*

*(b) If a request for reconsideration has been filed but has been summarily denied because the executive officer has not taken any action on the request within 20 days after receipt of the request, the underlying hearing officer order or decision shall become final. The effective date of the order or decision becoming final shall be the date that the order summarily denying the request for reconsideration was served on the parties.*

*(c) If a request for reconsideration has not been summarily denied, the order or decision of the executive officer that addresses and fully disposes of the request for reconsideration is the final order or decision. The effective date of the order or decision shall be the date that the decision was served on the parties.*

*NOTE: Authority cited: Sections 39600, 39601, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 43105, 43028 and 43031(a), Health and Safety Code.*

### **§ 60065.45. Judicial Review.**

*(a) A party adversely affected by the a final decision of the hearing officer or the executive officer on reconsideration, may seek judicial review by filing a petition for a writ of mandate in accordance with section 1094.5 of the California Code of Civil Procedure. The right to petition shall not be affected by the failure to seek reconsideration before the agency. Such petition shall be filed within 30 days after the order or decision becomes final.*

*(b) The state board may seek to enforce a final order or decision in superior court in accordance with applicable law.*

*NOTE: Authority cited: Sections 39600, 39601, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 43105, 43028 and 43031(a), Health and Safety Code; Section 1094.5, California Code of Civil Procedure.*

Attachment C

PROPOSED

State of California  
Air Resources Board

CALIFORNIA REGULATIONS FOR ADJUDICATORY HEARINGS

Amended:\_\_\_\_\_

**NOTE:** Proposed new language in the existing regulation is indicated by underline.

## **PROPOSED REGULATION ORDER**

### **Amend Section 60040, Article 4, Subchapter 1, Chapter 1, Division 3, Title 17, California Code of Regulations**

#### **Article 4. Adjudicatory Hearings**

##### **Subarticle 1. General Provisions**

#### **§ 60040. Applicability.**

(a) The provisions of this article shall apply to all adjudicatory hearings conducted for the purpose of reviewing any of the following decisions of the executive officer (1) vehicle or engine recalls pursuant to Health and Safety Code Section 43105; (2) intention to revoke or suspend a license as a vehicle emission test laboratory pursuant to Section 2048 of Title 13, California Code of Regulations; and (3) to other decisions of the executive officer where the person directly affected by the executive officer's action requests a hearing and where an adjudicatory hearing is required by law but neither the administrative adjudication procedures contained in Government Code Sections 11500, et seq. nor other hearing procedures are specified. The provisions of this article do not apply to review of decisions of the executive officer related to the programs or actions of air pollution control or air quality management districts.

(b) The provisions of this article shall apply to the review of all decisions of the executive officer covered by subparagraph (a) issued prior to the effective date of article 4.5, sections 60055.1, et seq.. All subsequently issued executive officer decisions shall be subject to the procedures set forth in article 4.5, sections 60055.1, et seq.

Note: Authority cited: Sections 39600 and 39601, Health and Safety Code. Reference: Sections 43105 and 44207, Health and Safety Code.

Attachment D

PROPOSED

State of California  
Air Resources Board

CALIFORNIA REGULATIONS FOR ADMINISTRATIVE HEARING PROCEDURES FOR  
PETITIONS FOR REVIEW OF EXECUTIVE OFFICER DECISIONS

Adopted:\_\_\_\_\_

**NOTE:** This is a proposed new document. All proposed language is indicated by *italics*.

## ***PROPOSED REGULATION ORDER***

***Adopt Article 4.25, Subchapter 1, Chapter 1, Division 3, Title 17,  
California Code of Regulations, to read as follows:  
Administrative Hearing Procedures for Petitions  
for Review of Executive Officer Decisions***

### ***Subarticle 1. General Provisions***

#### ***§ 60055.1. Applicability.***

*(a) The provisions of this article shall apply to all adjudicatory hearings conducted for the purpose of reviewing any of the following decisions of the executive officer to:*

*(1) Recall motor vehicles or motor vehicle engine families pursuant to Health and Safety Code Section 43105 and sections 2122, et seq., of Title 13, California Code of Regulations;*

*(2) Revoke or suspend a license as a vehicle emission test laboratory pursuant to section 2048 of Title 13, California Code of Regulations;*

*(3) Revoke or suspend a previously granted executive order certifying a motor vehicle engine family under Chapter 2, Part 5, Division 26 of the Health and Safety Code;*

*(4) Deny certification of a motor vehicle engine family under Chapter 2, Part 5, Division 26 of the Health and Safety Code; or*

*(5) Any other decision where the person directly affected by the executive officer's action requests a hearing and where an adjudicatory hearing is required by law but neither the administrative adjudication procedures contained in Government Code sections 11500, et seq., nor other hearing procedures are specified.*

*(b) The provisions of this article do not apply to review of decisions of the executive officer related to the programs or actions of air pollution control or air quality management districts, and final orders or decisions under this regulation and section 60075.45.*

*(c) The provisions of this article apply only to executive officer decisions issued on or after the effective date of this article.*

*Note: Authority cited: Sections 39600 and 39601, Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 43105 and 43028, Health and Safety Code; Sections 60075, et seq., Title 17 and 2048, Title 13, California Code of Regulations; Sections 11500, et seq., Government Code.*

**§ 60055.2. Definitions.**

*(a) The definitions applicable to these rules include those set out in the Health and Safety Code (commencing with section 39010) and in Title 13, California Code of Regulations, Chapter 5, Standards for Motor Vehicle Fuels, sections 2250, et seq., and Chapter 8, Clean Fuels Program, sections 2300, et seq.*

*(b) The following definitions also apply:*

*(1) "Administrative record" means all documents and records timely filed with the hearing office, pursuant to section 60055.4 and the time deadlines of these rules, including pleadings, petitions, and motions; all documents or records admitted into evidence or administratively noticed by the hearing officer; all official recordings or written transcripts of hearings conducted; and all orders or decisions issued by the hearing officer or the state board regarding the petition for review of an executive officer decision; administrative record does not include any prohibited communications as defined in section 60055.13, and any settlement discussions or offers of settlement pursuant to section 60055.24.*

*(2) "Days" means calendar days.*

*(3) "Default" means the failure of any party to take the steps necessary and required by these regulations to further the hearing towards resolution, resulting in a finding by the hearing officer of forfeiture of the cause of action against that party.*

*(4) "Discovery" refers to the process set forth in section 60055.25 allowing one party to request and obtain information relevant to the proceedings. The scope of discovery is limited by the express terms of that section.*

*(5) "Ex Parte Communication" means an oral or written communication not on the public record for which reasonable prior notice to all parties should have been given.*

*(6) "Hearing Office" refers to the administrative hearings office established by the state board to conduct administrative hearings to implement the provisions of these rules or to the Office Administrative Hearings established pursuant to Government Code section 11370.2. The administrative hearing office of the state board shall include at least one administrative law judge who shall act as a hearing officer.*

*(7) "Hearing Officer" refers to an administrative law judge appointed by the state board to conduct hearings under these procedures or an administrative law judge appointed by the Office of Administrative Hearings.*

*(8) "Party" includes the petitioner and executive officer and employees of the state board who have been authorized to investigate, represent or otherwise participate in proceedings of a petition for review.*

(9) “Petition” means petition to review an executive officer decision.

(10) “Petitioner” means a person directly affected by a decision of the executive officer who requests a hearing pursuant to Subarticle 5 to review that decision.

(11) “Proceeding” means any hearing, determination or other activity before the hearing officer involving the parties to a petition for review.

(12) “Response” means a document filed by the executive officer responding to the petition for review.

(13) “Settlement Agreement” means a written agreement executed by the petitioner and the executive officer that respectively settles the allegations at issue in the petition for review.

NOTE: Authority cited: Sections 39600, 39601, 39010, et seq., Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 39514, 43105, 43028, Part 5, (commencing with 39010) Health and Safety Code; Sections 2250, et seq., 2300, et seq., Title 13; Sections 60075.1, et seq., Article 5, Title 17, California Code of Regulations.

### **§ 60055.3. Right to Representation.**

(a) A party may appear in person or through a representative, who is not required to be an attorney at law. The right to representation is at the party’s own expense. Following notification that a party is represented by a person other than him or herself, all further communications regarding the proceedings shall be directed to that representative.

(b) A representative of a party shall be deemed to control all matters respecting the interest of such party in the proceeding. Persons who appear as representatives shall not engage in unethical conduct or intentionally fail to observe the procedures set forth in these rules and the proper instructions or orders of the hearing officer.

(c) A representative may withdraw an appearance by filing a written notice of withdrawal with the hearing office and by serving a copy on all parties.

NOTE: Authority cited: Sections 39600, 39601, 43028, Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Section 43105, Health and Safety Code; Sections 2180, et seq., Title 13, California Code of Regulations.

**§ 60055.4. Time Limits; Computation of Time.**

*(a) All actions required pursuant to these rules shall be completed within the times specified in this article, unless extended by the hearing officer upon a showing of good cause, after consideration of prejudice to other parties. Requests for extensions of time for the filing of any pleading, letter, document, or other writing or completing any other required action must be received in advance of the date on which the filing or action is due and should contain sufficient facts to establish a reasonable basis for the relief requested.*

*(b) In computing the time within which a right may be exercised or an act is to be performed, the day of the event from which the designated period runs shall not be included and the last day shall be included. If the last day falls on a Saturday, Sunday, or a state holiday, time shall be extended to the next working day.*

*(c) In computing time, the term "day" means calendar day, unless otherwise provided.*

*(d) Unless otherwise indicated by proof of service, the mailing date shall be presumed to be the postmark date appearing on the envelope if first-class postage was prepaid and the envelope was properly addressed.*

*(e) Where service of any pleading, petition, letter, document, or other writing is by mail, overnight delivery, or facsimile transmission (fax), pursuant to section 60055.5(c), and if within a given number of days after such service, a right may be exercised, or an act is to be performed, the time within which such right may be exercised or act performed shall be extended as provided in section 60055.5(c).*

*(f) Papers delivered to or received by the hearing office during regular business hours (8 a.m. to 5 p.m.) will be filed on that date. Papers delivered or received at times other than regular business hours will be filed on the next regular business day.*

*NOTE: Authority cited: Sections 39600, 39601, Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Section 43105, Health and Safety Code.*

**§ 60055.5. Service, Notice and Posting.**

*(a) Except as otherwise provided in this article, the original of every pleading, petition, letter, document, or other writing served in a proceeding under these rules shall be filed with the designated hearing officer.*

*(b) Unless otherwise required, service of any documents in the proceedings may be made by personal delivery; by United States first-class mail, by overnight delivery, or by fax.*

*(1) Service is complete at the time of personal delivery.*

*(2) In the case of first-class mail, the documents to be served must be deposited in a post office, mailbox or mail chute, or other like facility regularly maintained by the United States Postal Service, in a sealed envelope, properly addressed to the person on whom it is to be served at the address as last given by that person on any document filed in the present cause of action and served on the party making service or otherwise at the place of residence of the person to be served. The service is complete at the time of the deposit, but any period of notice and any right or duty to do any act or to make any response within any period or date prescribed after service of the document shall be extended five days if the place of address is within the State of California, ten days if the place of address is outside the State of California but within the United States, and 15 days if the place of address is outside the United States.*

*(3) If served by overnight delivery, the document must be deposited in a box or other facility regularly maintained by the express service carrier, or delivered to an authorized courier or driver authorized by the express service carrier to receive documents, in an envelope or package designated by the express service carrier with delivery fees paid or provided for, addressed to the person on whom it is to be served, at the address as last given by the person on any document filed in the present cause of action and served on the party making service or otherwise at that place of residence of the person to be served. The service is complete at the time of the deposit, but any period of notice and any right or duty to do any act or to make any response within any period or date prescribed after service of the document shall be extended two days.*

*(4) If served by fax, the document must be transmitted to a fax machine maintained by the person on whom it is served at the fax machine telephone number as last given by that person on any document which he or she has filed in the present cause of action and served on the party making the service. The service is complete at the time of the transmission, but any period of notice and any right or duty to do any act or to make any response within any period or date prescribed after service of the document shall be extended two days.*

*(c) Each document filed shall be accompanied by a proof of service on each party or its representative of record on the date of service. The proof of service shall state whether such service was made personally, first-class mail, overnight delivery, or facsimile.*

*(1) Where service is made by personal delivery, the declaration shall show the date and place of delivery and the name of the person to whom the documents were handed. Where the person making the service is unable to obtain the name of his or her person to whom the documents were handed, the person making the service may substitute a physical description for the name.*

*(2) Where service is made by first-class mail or overnight delivery, the declaration shall show the date and place of deposit in the mail, the name and address of the person served as shown on the mailing envelope and that the envelope was sealed and deposited in the mail with the postage fully prepaid.*

*(3) Where service is made by fax, the declaration shall show the method of service on each party, the date sent, and the fax number to which the document was sent.*

*(d) The proof of service declaration shall be signed by the person making it and contain the following statement above the signature: "I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and this declaration was executed at (City, State) on (Date)." The name of the declarant shall be typed and signed below this.*

*(e) Proof of service made in accordance with Code Civil Procedure section 1013a complies with this regulation.*

*(f) Service and notice to a party who has appeared through a representative shall be made upon such representative.*

*NOTE: Authority cited: Sections 39600, 39601, Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 43105, Health and Safety Code; Sections 11182, 11184, Government Code; Sections 1013 and 1013a Code of Civil Procedure.*

#### **§ 60055.6. Motions.**

*(a) Any motion or request for action by the hearing officer relating to any proceeding pending before him or her filed by any party, except those made orally on the record at the hearing, shall be in writing and shall be directed to the hearing officer, with written notice and proof of service to all parties. The caption of each motion shall contain the title and docket number of the proceeding and a clear and plain statement of the relief sought, together with the grounds therefore.*

*(b) Except as otherwise provided by statute or these regulations, or as ordered by the hearing officer, a motion shall be made and filed at least 15 days before the date set for the motion to be heard or the commencement of the hearing on the merits. Any response to the motion shall be filed and served no later than five days before the motion is scheduled to be heard or as ordered by the hearing officer.*

*(c) The hearing office shall set the time and place for the hearing of the motion. The hearing shall occur as soon as practicable.*

*(d) Except as otherwise provided by statute or these regulations, the hearing officer may decide a motion filed pursuant to this section without oral argument. Any party may request oral argument at the time of the filing of the motion or the response. If the hearing officer orders oral argument, the party requesting oral argument, or any party directed to do so by the hearing officer, shall serve written notice on all parties of the date, time and place of the oral argument. The hearing officer may direct that oral argument be made by telephone conference call. The hearing officer may order that the proceedings be recorded.*

*(e) The hearing officer shall issue a written order deciding any motion, unless the motion is made during the course of the hearing on the merits while on the record. The hearing officer may request that the prevailing party prepare a proposed order.*

*(f) A request for a prehearing conference or a settlement conference under sections 60055.23 and 60055.27 does not constitute a motion within the meaning of this section.*

*NOTE: Authority cited: Sections 39600 and 39601, Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Section 43105, Health and Safety Code.*

#### **§ 60055.7. Form of Pleadings.**

*(a) Except as otherwise expressly provided in this article or by the hearing officer, there are no specific requirements as to the form of documents filed in a proceeding under these rules.*

*(b) The original of any pleading, letter, document, or other writing (other than an exhibit) shall be signed by the filing party or its representative. The signature constitutes a representation by the signer that it has read the document, that to the best of its knowledge, information and belief, the statements made therein are true, and that it has not filed the document for the purpose of delay.*

*(c) The initial document filed by any person shall indicate his or her status (as a party or representative of the party) and shall contain his or her name, address and telephone number. Any changes in this information shall be communicated promptly to the hearing office and all parties to the proceeding. A party who fails to furnish such information and any changes to it shall be deemed to have waived his or her right to notice and service under these rules.*

*NOTE: Authority cited: Sections 39600 and 39601, Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Section 43105, Health and Safety Code.*

#### **§ 60055.8. Limitations on Written Legal Arguments or Statements.**

*(a) Any written legal argument or statement submitted to the hearing officer by a participant in an action under this part shall be double spaced and typed in a font size 12 point or larger. Except as otherwise provided by this part, further limited by the hearing officer, or otherwise authorized by the hearing officer for good cause shown, no written legal argument, exclusive of any supporting documentation, may exceed:*

*(1) Fifteen pages, for arguments in support of or opposition to motions; and*

*(2) Five pages, for reply arguments.*

*Note: Authority cited: Sections 39600 and 39601, Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Section 43105, Health and Safety Code.*

**§ 60055.9. Records of the State Board.**

*Except where public disclosure of information or exhibits is restricted by law, records of the state board are public records and are available to the public pursuant to section 91000, et seq., Title 17, California Code of Regulations.*

*NOTE: Authority cited: Sections 39600 and 39601, Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Section 43105, Health and Safety Code; Section 6250, et seq., Government Code; Sections 91000, et seq., Title 17, California Code of Regulations.*

**§ 60055.10. Interpreters and Other Forms of Accommodation.**

*(a) In proceedings where a party, a party's representative, or a party's expected witness requires an interpreter for any language, including sign language, that party shall be responsible for notifying the hearing office as soon as the requirement is known, but no later than ten days prior to the first day of hearing. The hearing officer may allow later notification for good cause. The hearing office shall be responsible for securing the interpreter, and for providing reasonable accommodation.*

*(b) The cost of interpreter services shall be paid by the state board if the hearing officer so directs. In determining who should pay the cost of the interpreter, the hearing officer shall base the decision on equitable considerations, including the ability of the party in need of the interpreter to pay the cost.*

*Note: Authority cited: Sections 39600 and 39601, Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Section 43105, Health and Safety Code; Sections 11435.25, 11435.30 and 11435.55, Government Code; Section 751, Evidence Code.*

**Subarticle 2. Hearing Officers**

**§ 60055.11. Authority of Hearing Officers.**

*In any matter subject to hearing pursuant to these rules, the hearing officer shall have the authority to do any act and take all measures necessary for the maintenance of order and for the efficient, fair and impartial adjudication of issues arising in proceedings governed by these rules, including, but not limited to, authority to hold prehearing conferences; conduct hearings to determine all issues of fact and law presented; to rule upon motions, requests and offers of proof, dispose of procedural requests, and issue all necessary orders; administer oaths and affirmations and take affidavits or declarations; to issue subpoenas and subpoenas duces tecum for the attendance of a person and production of testimony, books, documents, or other things;*

*to compel the attendance of a person residing anywhere in the state; to rule on objections, privileges, defenses, and the receipt of relevant and material evidence; to call and examine a party or witness and introduce into the hearing record documentary or other evidence; to request a party at any time to state the respective position or supporting theory concerning any fact or issues in the proceeding; to certify official acts; to extend the submittal date of any proceeding; to hear and determine all issues of fact and law presented and to issue such interlocutory and final orders, findings, and decisions as may be necessary for the full adjudication of the matter.*

*NOTE: Authority cited: Sections 39600 and 39601, Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Section 43105, Health and Safety Code; Sections 11181-11182 and 11425.30, Government Code.*

**§ 60055.12. Disqualification.**

*(a) The hearing officer or a member of the state board shall disqualify himself or herself and withdraw from any case in which he or she cannot accord a fair and impartial hearing.*

*(b) Any party may request the disqualification of a hearing officer or member of the state board by filing an affidavit or declaration under penalty of perjury. A request for the disqualification of a hearing officer must be made no later than five days prior to the commencement of a prehearing conference or first day of hearing on the merits, whichever is earlier. A request for the disqualification of a member of the state board must be made no later than five days prior to the state board's consideration of the recommended decision. The affidavit or declaration must state with particularity the grounds upon which it is claimed that a fair and impartial hearing cannot be accorded. Where the request for disqualification concerns a member of the state board, the issue shall be determined by the other members of the board. Where the request concerns the hearing officer, the issue shall be determined by the hearing officer.*

*NOTE: Authority cited: Sections 39600 and 39601, Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Section 43105, Health and Safety Code; Sections 11425.40 and 11512, Government Code.*

**Subarticle 3. Ex Parte Communications**

**§ 60055.13. Prohibited Communications.**

*(a) Except as otherwise provided in this section, while the proceeding is pending, the hearing officer shall not participate in any communications with any party, representative of a party, or any person who has a direct or indirect interest in the outcome of the proceeding about the subject matter or merits of the case at issue, without notice and opportunity of all parties, to participate in communication except a party that has been determined to be in default pursuant to section 60055.37.*

*(b) No pleading, letter, document, or other writing shall be filed in a proceeding under these rules by a party unless service of a copy thereof together with any exhibit or attachment is made on all other parties to a proceeding. Service shall be in a manner as prescribed in section 60055.5.*

*(c) For the purpose of this section, a proceeding is pending from the time that the petition for review of an executive officer decision is filed.*

*(d) Communications prohibited under paragraph (a) do not include communications concerning matters of procedure or practice, including requests for continuances that are not in controversy. It also does not prohibit communications between a party and the hearing officer when the opposing party has had a default entered pursuant to section 60055.37.*

*(e) A communication that would otherwise be prohibited by this section from an employee of the state board to the hearing officer is permissible if such employee has not served as an investigator, prosecutor, or advocate in the proceeding or its preadjudicative stage, and the purpose of the communication is to assist and advise the hearing officer in the initial determination of whether a document is a confidential business record (i.e., trade secrets) and reviewing the evidence in the record and drafting a decision or order. In carrying out these functions, the employee of the state board shall not furnish, augment, diminish, or modify the evidence in the record.*

*NOTE: Authority cited: Sections 39600, 39601 and 43028, Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 43105 and 43028, Health and Safety Code; Sections 11430.70 - 11430.80, Government Code.*

#### **§ 60055.14. Disclosure of Communication.**

*(a) If, while the proceeding is pending, but before serving as hearing officer, the hearing officer receives a communication of a type that would be in violation of this subarticle if received while serving as hearing officer, he or she shall, promptly after starting to serve, disclose the content of the communication on the record and give all parties an opportunity to address it as provided below.*

*(b) If a hearing officer receives a communication in violation of this article, the hearing officer shall make all of the following a part of the record in the proceeding:*

*(1) If the communication is written, the writing and any written response of the hearing officer to the communication; and*

*(2) If the communication is oral, a memorandum stating the substance of the communication, any response made by the hearing officer, and the identity of each person from whom the hearing officer received the communication.*

*(c) The hearing officer shall notify all parties that a communication described in this section has been made a part of the record.*

*(d) If a party requests an opportunity to address the communication within ten days after receipt of notice of the communication:*

*(1) The party shall be allowed to comment on the communication.*

*(2) The hearing officer has discretion to allow the party to present evidence concerning the subject of the communication, including discretion to reopen a hearing that hearing having been concluded.*

*(e) Receipt of ex parte communications may be cause for disqualification of the hearing officer.*

*NOTE: Authority cited: Sections 39600 and 39601, Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Section 43105, Health and Safety Code; Sections 11340.1 - 11340.5, Government Code.*

**§ 60055.15. Applicability to the State Board.**

*(a) The provision of Subarticle 3 governing ex parte communications to the hearing officer also governs ex parte communications with members of the state board on matters that may come before them pursuant to Subarticles 4 and 9.*

*(b) Except as provided in Subarticle 10 while a proceeding is pending, the hearing officer shall have no communication, direct or indirect, with the members of the state board regarding the merits of any issue in the proceeding.*

*NOTE: Authority cited: Sections 39600 and 39601, Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Section 43105, Health and Safety Code; Sections 11430.70 - 11430.80 Government Code.*

***Subarticle 4. Filing and Initial Review of Petitions for Review and Executive Officer's Response***

**§ 60055.16. Filing of Petitions for Review Hearing.**

*(a) Within 30 days after receipt of a decision by the executive officer described in section 60055.1, a person directly affected by the decision may file a petition requesting a hearing to review the decision. The hearing officer may extend the time for filing for good cause.*

*(b) A petition shall be filed with the clerk of the board, at the offices of the state board in Sacramento and a copy served on the executive officer. The petition shall include the following information:*

*(1) The name and address of the petitioner;*

*(2) A copy of the executive officer decision for which review is requested;*

*(3) The date the decision was received by the petitioner;*

*(4) A statement of the objections to the decision upon which review is requested; a verified statement of the facts, data and other relevant evidence in support of the objections; a demand for the specific relief the petitioner seeks; a short, concise statement of legal argument, with citation to authorities, in support of the objections and the relief requested. The verification may be made on information and belief.*

*(c) The petitioner may request permission from the hearing officer to amend the petition. Such request must include an amended statement of objections and, as applicable, verified statement of facts, data, and other relevant evidence in support of the amended objections; demand for the specific relief the petitioner seeks; and amended statement of legal argument. The hearing officer may grant the request upon determining that good cause exists and that no party shall be unduly prejudiced by the decision.*

*Note: Authority cited: Sections 39600 and 39601, Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Section 43105, Health and Safety Code.*

**§ 60055.17. Appointment of a Hearing Officer; Initial Review of Petition.**

*(a) Upon receipt of a petition, the state board shall refer the matter to the administrative hearing office of the state board for assignment of a hearing officer. The hearing office shall assign an administrative law judge from the hearing office to hear the matter, unless staffing and other resources of the hearing office would prevent timely consideration of the matter. If the resources of the administrative hearing office prevent assignment, the administrative hearing office shall refer the matter to the State Office of Administrative Hearings (OAH) for assignment. For the two years immediately following the effective date of these hearing procedures, it shall be presumed that petitions requesting review of executive officer decisions ordering the recall of motor vehicles or motor vehicle engines or the suspension, revocation, or denial of executive orders certifying motor vehicles or motor vehicle engines are too resource intensive, given the present staffing of the administrative hearing office of the state board. For the two year period identified above, such matters shall be immediately referred to the OAH for assignment.*

*(b) Within 20 days of assignment of a hearing officer, the hearing officer shall review the petition and determine whether a hearing is required by law. Pursuant to section 60055.1(b), all petitions seeking review of executive officer decision to recall motor vehicles or engines under Health and Safety Code section 43105, to revoke or suspend a license as a vehicle emission test laboratory under Title 13, CCR, section 2048, or to revoke or suspend an Executive Order granting certification to a motor vehicle engine family under chapter 2, part 5, Division 26 of the Health and Safety Code shall have the right to a hearing. Petitions for review of executive officer decisions to deny applications for motor vehicle certifications shall be entitled to a hearing on the merits, unless the hearing officer finds that the petition and supporting data and information do not raise a substantial issue of fact or law. If the hearing officer determines that a hearing is not required, the petitioner shall be notified of the decision and there shall be no hearing under this article.*

*(c) A petitioner adversely affected by a hearing officer determination that a hearing is not required may request reconsideration by the state board under Subarticle 10.*

*(d) The clerk of the state board shall make arrangements to send a copy of the petition and any decision of the hearing officer or the state board to any person who was given written notice of the executive officer's decision.*

*Note: Authority cited: Sections 39600 and 39601, Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Section 43105, Health and Safety Code.*

#### **§ 60055.18. Stays Pending Hearing.**

*(a) On timely receipt of a petition requesting a hearing to review a decision of the executive officer to recall motor vehicles or motor vehicle engines, the hearing officer shall issue a stay of the executive officer action until a decision of the state board has been issued pursuant to section 60055.44.*

*(b) The hearing officer shall not issue a stay pending review of an executive officer decision denying certification of an motor vehicle engine family pursuant to Chapter 2, Part 5, Division 26 of the Health and Safety Code.*

*(c) For other decisions of the executive officer for which petitions for review have been filed and hearings granted, the hearing officer shall issue a stay pending issuance of the state board's decision under section 60055.38, unless the hearing officer finds that the adverse effects of a stay on the public health, safety and welfare outweigh the harm to those persons directly affected by the lack of a stay. The hearing officer may conduct a hearing or request such submissions by the parties as necessary to obtain information to make a determination on this issue.*

*(d) If a stay is granted under subparagraphs (a) and (c) above, and the petition is subsequently denied by the Board, the Board may order the petitioner to take whatever remedial action is necessary, including implementing a recall of those vehicles and engines that would not otherwise have been sold in or delivered to California but for the stay, to achieve emissions reductions equal to the amount of emissions that occurred because of implementation of the stay.*

*Note: Authority cited: Sections 39600 and 39601, Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Section 43105, Health and Safety Code.*

#### **§ 60055.19. Executive Officer Response to Petition.**

*Within ten days after issuance of the hearing officer determination that a hearing is required or ten days after a petition has been amended, the executive officer shall file with the hearing officer and serve upon the petitioner a response to the petition. The response shall contain the reasons for and the facts in support of the decision of the executive officer under review. If a petition for review raises claims or issues in a manner that is so vague or ambiguous that the executive officer cannot reasonably be expected to respond, the executive officer may, within the time allotted for responding, move that the hearing officer require a more definite statement of matters covered in the petition for review. If such motion is granted, the petitioner shall comply within ten days of issuance of the order of the hearing officer.*

*Note: Authority cited: Sections 39600 and 39601, Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Section 43105, Health and Safety Code.*

### **Subarticle 5. Prehearing Procedures**

#### **§ 60055.20. Scheduling of Hearings.**

*(a) Within 30 days after receipt of the executive officer's response, the hearing office shall schedule the hearing on the merits of the petition. Except as provided in paragraph (f), below, a hearing on the merits of a petition for review shall, in general, be scheduled to be heard no later than 180 days from the date of the hearing officer's determination under section 60055.17 that a hearing on the petition for review is appropriate. The hearing officer may determine, for good cause and in the interest of justice, that a later hearing date is necessary.*

*(b) The hearing office shall deliver or mail a notice of hearing to all parties at least 30 days prior to the hearing. The notice shall be in the form specified in section 11509 of the Government Code, and shall also provide notice of the availability of interpreters pursuant to section 60055.10 of these rules.*

*(c) The hearing officer shall grant such delays or continuances as may be necessary or desirable in the interest of fairly resolving the case.*

*(1) The hearing officer may, on his or her own motion or upon request of any party accompanied by a showing of good cause, continue a hearing to another time or place.*

*(2) A party shall apply to the hearing officer for a continuance not less than five days prior to the scheduled hearing.*

*(3) When a continuance is ordered during a hearing, the hearing officer shall give written notice of the time and place of the continued hearing.*

*(d) The hearing office shall set the place of hearing at a location as near as practicable to the place where the petitioner resides or maintains a place of business in California. If the owner does not reside or maintain a place of business in California, the hearing shall be in Sacramento. The hearing office may establish hearing locations anywhere in the state; at a minimum one hearing location shall be established in Sacramento and one in the Los Angeles area.*

*(e) Upon the motion of any party and a showing of good cause, or upon the motion of the hearing officer, and in the absence of an objection from any party, the hearing officer may exercise discretion to conduct all or part of a hearing by telephone.*

*(1) In granting such a motion, the hearing officer must be assured that each participant in the hearing has an opportunity to participate in and to hear the entire proceeding while it is taking place and to observe all exhibits fully.*

*(2) The hearing officer may direct the party who has requested the alternative method to make the necessary arrangements and be responsible for any associated costs.*

*(f) (1) If a hearing has been granted under section 60055.17 in a proceeding requesting review of an executive officer decision denying certification to motor vehicle engine families pursuant to Chapter 2, Part 5, Division 26 of the Health and Safety Code, a motor vehicle manufacturer may file a petition requesting that the hearing schedule be expedited. Such petitions shall be filed concurrently with the petition for review of the action and shall be accompanied by affidavits and other evidence setting forth the reasons why expedited scheduling is warranted. A hearing officer shall be assigned to consider the petition for expedited scheduling and shall issue a determination on the petition within five business days of receipt of the petition. The hearing officer shall grant the petition for expedited scheduling upon the manufacturer presenting evidence showing a reasonable likelihood that it may suffer serious competitive harm if the petition is not granted.*

*(2) If the petition for expedited scheduling is granted:*

*(a) The hearing office shall give priority to the scheduling of the hearing on the merits and shall make every effort to schedule the first day of hearing no later than ten days after the granting of the petition.*

*(b) The hearing officer shall issue a recommended decision that the Board may accept, reject, or modify as necessary.*

*(3) Notwithstanding section 60055.25, and subject to the discretion of the hearing officer, the parties shall have limited rights to discovery in a matter scheduled for expedited hearing. The parties shall exchange lists of witnesses that are expected to testify and copies of exhibits that are expected to be introduced at hearing no later than 48 hours prior to the commencement of the hearing. The hearing officer may disallow the testimony of witness or the introduction of any evidence that is not timely provided to the opposing party.*

*(4) Unless expressly provided by the hearing officer, the parties shall not have the opportunity to present closing written arguments.*

*(5) The hearing officer shall attempt to issue his or her decision as expeditiously as possible, but not later than ten days after the close of hearing.*

*(6) Upon issuance of the proposed decision of the hearing officer, the decision shall be delivered to the board for review, with copies served on the parties. Consistent with the requirements of Government Code section 11125, the state board shall consider the recommended decision at its next scheduled meeting. The state board may accept, reject, or modify the hearing officer's proposed decision. If the state board rejects or makes substantive modifications to the proposed decision, it shall issue a written decision, with findings of fact and conclusions of law in support of its decision.*

*(7) The decision of the state board is not subject to reconsideration under section 60055.41.*

*NOTE: Authority cited: Sections 39600 and 39601, Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Section 43105, Health and Safety Code; Sections 11509 and 11440.30, Government Code.*

**§ 60055.21. Motion to Intervene.**

*(a) A person may file a motion to intervene, and the hearing officer may grant such a motion if all of the following conditions are satisfied:*

*(1) The motion is in writing, with copies served on all parties named in the petition for review.*

*(2) The motion is made as early as practicable prior to the prehearing conference, if one is held, or the first day of the hearing on the merits of the petition for review.*

*(3) The motion states facts demonstrating that the requesting intervenor's legal rights, duties, privileges, or immunities will be substantially affected by the proceeding or that it qualifies as an intervenor under a statute or regulation.*

*(4) The hearing officer determines that the interests of justice and the orderly and prompt conduct of the proceeding will not be impaired by allowing the intervention.*

*(b) If the motion is granted, the hearing officer may impose conditions on the intervenor's participation in the proceeding, either at the time that intervention is granted or at a later time. Conditions may include:*

*(1) Limiting the intervenor's participation to designated issues in which the intervenor has a particular interest demonstrated by the motion.*

*(2) Limiting or excluding the use of discovery, cross-examination, and other procedures involving the intervenor so as to promote the orderly and prompt conduct of the proceeding.*

*(3) Requiring two or more intervenors to combine their presentations of evidence and argument, cross-examination, discovery, and other participation in the proceeding.*

*(4) Limiting or excluding the intervenors's participation in settlement negotiations.*

*(c) The hearing officer shall issue an order granting or denying the motion for intervention as soon as practicable in advance of the hearing, briefly stating the reasons for the order and specifying any conditions that he or she has determined as appropriate. The hearing officer may modify the order at any time, stating the reasons for the modification. The hearing officer shall promptly give notice of any order granting, denying, or modifying intervention to the applicant and to all parties.*

*(d) Whether the interests of justice and the orderly and prompt conduct of the proceedings will be impaired by allowing intervention is a determination to be made at the sole discretion of the hearing officer, based on his or her knowledge and judgment. The determination is not subject to administrative or judicial review.*

*NOTE: Authority cited: Sections 39600 and 39601, Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Section 43105, Health and Safety Code. Section 11440.50, Government Code.*

**§ 60055.22. Consolidation, Separation of Proceedings.**

*(a) Upon the motion of a party or upon the hearing officer's own motion, the hearing officer may consolidate for hearing and decision:*

*(1) Any number of proceedings involving the same respondent or petitioner;*

*(2) Any number of proceedings involving common issues of law or fact where consolidation would expedite and simplify consideration of the issues and would not adversely affect the rights of the parties.*

*(b) Upon the motion of a party or upon the hearing officer's own motion, the hearing officer may, in furtherance of convenience or to avoid prejudice or when separate hearings will be conducive to expedition and economy, order a separate hearing of any issue, including an issue raised in the notice of defense, or of any number of issues.*

*NOTE: Authority cited: Sections 39600 and 39601, Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Section 43105, Health and Safety Code.*

**§60055.23. Prehearing Conference.**

*(a) Upon the scheduling of a petition for review for hearing, the hearing officer may order the scheduling of a prehearing conference upon his or her own motion or the request of any party. A request for a prehearing conference shall be in writing, addressed to the hearing officer and served on all parties.*

*(b) A prehearing conference shall be held no later than 30 days after an order of the hearing officer or a request by a party, but no later than 60 days from the date of the executive officer's filing of its response to the petition.*

*(c) The hearing officer may conduct the prehearing conference in person or by telephone.*

*(d) At least ten business days before a scheduled conference, each party shall file with the hearing office and serve on all other parties a prehearing conference statement which shall contain the following information:*

- (1) Identification of all operative pleadings by title and date signed;*
  - (2) The party's current estimate of time necessary to try the case;*
  - (3) The name of each witness the party may call at hearing along with a brief statement of the content of the witness's expected testimony;*
  - (4) The identity of any witness whose testimony will be presented by affidavit pursuant to section 60055.29, if known;*
  - (5) The name and address of each expert witness the party intends to call at hearing along with a brief statement of the opinion the expert is expected to give. The party shall also attach a copy of a current resume for each expert witness;*
  - (6) Whether there is need for an interpreter or special accommodation at the hearing;*
  - (7) A list of the documentary exhibits the party intends to present at hearing and a description of any physical or demonstrative evidence; and*
  - (8) A concise statement of any legal issues which may affect the presentation of evidence or the disposition of the case.*
- (e) At the prehearing conference, the hearing officer may:*
- (1) Establish a time and place for further proceedings in the action, but no hearing on the merits of the action shall take place sooner than 30 days following the date of the prehearing conference;*
  - (2) Attempt to simplify issues and help the parties to stipulate to facts not in dispute;*
  - (3) Explore the necessity or desirability of amendments to the pleadings; and*
  - (4) Discuss any other appropriate subject.*
- (f) After the prehearing conference, the hearing officer shall issue a prehearing order which incorporates the matters determined at the conference. This order may be issued orally if an accurate record can be made. Agreement on the simplification of issues, amendments, stipulations, or other matters may be entered on the record or may be made the subject of a written order by the hearing officer. If no matters were determined or dates set at the prehearing conference, a prehearing order is not required. The hearing officer may, to aid the efficient administration of justice, modify the prehearing order as necessary.*

*Note: Authority cited: Sections 39600 and 39601, Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Section 43105, Health and Safety Code.*

**§60055.24. Settlement Agreements and Consent Orders.**

*(a) At any time before a final decision is issued, parties, the complainant and the respondent may settle the matters at issue, in whole or in part.*

*(b) The parties may request the assistance of the hearing office in their attempts to settle the matters at issue. Upon receiving such a request, the hearing office may assign a settlement hearing officer, who is not the same hearing officer that has been assigned, to hear the merits of the case, unless the parties specifically request in writing the assignment of the latter hearing officer.*

*(c) The parties shall memorialize any agreement in writing.*

*(d) In a petition for review proceeding, if the parties resolve all issues raised by the petition, the petitioner shall agree to withdraw the petition and the case shall be dismissed.*

*(e) If the settlement does not wholly conclude the action, the hearing officer assigned to hear the merits of the case shall promptly inform the parties of the schedule of the remaining proceedings.*

*(f) Unless the parties have otherwise consented to use the hearing officer assigned to hear the merits of the case in settlement discussions, settlement discussions or offers of compromise regarding unresolved issues shall not be discussed with that hearing officer. Settlement discussions or offers of compromise shall also not be made part of the record of the proceedings.*

*Note: Authority cited: Sections 39600 and 39601, Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Section 43105, Health and Safety Code; section 11415.60, Government Code.*

**§ 60055.25. Discovery.**

*(a) The provisions of this section provide the exclusive right to, and method of, discovery as to any proceeding governed by these hearing procedures. However, nothing in this section prohibits the the parties from voluntarily stipulating to provide discovery deemed appropriate. This section does not authorize the inspection or copying of, any writing, or thing which is privileged from disclosure by law or protected as part of an attorney's work product.*

*(b) The names and addresses of witnesses; inspection and copying of documents and things.*

*(1) Unless otherwise stipulated to by the parties, within 30 days of the hearing officer's determination that a hearing is required under section 60055.17, a party may request:*

*(A) The names and addresses of witnesses to the extent known to the other party, including, but not limited to, those intended to be called to testify at the hearing; and*

*(B) The opportunity to inspect and make a copy of any thing, document, statement or other writings relevant to the issues for hearing that are in the possession, custody or control of the other party and would be admissible in evidence. This includes the following information from inspection or investigative reports prepared by, or on behalf of, any party that pertain to the subject matter of the proceeding: (i) the names and addresses of witnesses or of persons (other than confidential informants) having personal knowledge of the issues involved in the proceeding, (ii) matters perceived by the investigator in the course of his or her investigation (as opposed to his or her analysis or conclusions), and (iii) statements related to the issues of the proceedings which are otherwise admissible.*

*(2) Parties shall arrange a mutually convenient time for the exchanging of the names and addresses of witnesses and the inspecting and copying of relevant things, documents, statements, and other writings identified in subparagraph (B) above, but such date shall not be later than 30 days from the date of receipt of the request made pursuant to subparagraph (b)(1). Unless other arrangements are made, the party requesting the writings shall pay for the copying.*

*(3) All requests under subparagraph (b) are continuing, and the party receiving the request shall be under a continuing duty to provide the requesting party with the information requested.*

*(4) Absent a stipulation between the parties, a party claiming that certain writings or things are privileged against disclosure shall, within 15 days of receipt of the request for inspection and copying, serve on the requesting party a written statement setting forth what matters it claims are privileged and the reasons supporting its claims.*

*(c) Other Discovery.*

*(1) A party may file a motion requesting that the hearing officer order further discovery. The motion shall specify the proposed method of discovery to be used and shall include affidavits describing in detail the nature of the information and/or documents sought, the*

*proposed time and place of the discovery (if applicable), and the information addressing the findings listed in subparagraphs (A)-(D) below. The hearing officer shall grant the motion upon finding that:*

*(A) The additional discovery will not unreasonably delay the proceedings;*

*(B) The information to be obtained from the discovery is most reasonably obtained from the non-moving party, who has refused to provide it voluntarily; or that*

*(C) The information to be obtained is relevant and has significant probative value on a disputed issue of material fact regarding a matter at issue.*

*(2) The hearing officer may order the taking of oral depositions only under the following circumstances:*

*(A) After affirmatively making the findings in subparagraphs (c)(2)(A)- (C), and further finding that the information sought cannot be obtained by alternative methods; or*

*(B) There is substantial reason to believe that relevant and probative evidence may otherwise not be preserved for presentation by a witness at the hearing.*

*(3) If the hearing officer grants the motion for the taking of a deposition, the moving party shall serve notice of the deposition on the person to be deposed with copies served on the other parties at least ten days before the date set for the deposition.*

*(4) Where the witness resides outside of the state and where the hearing officer has ordered the taking of the testimony by deposition, the hearing officer shall obtain an order of the court to that effect by filing a petition in the superior court in Sacramento County. The proceedings for such a hearing shall be in accordance with the provisions of Government Code section 11189.*

*(d) Protective Orders:*

*(1) Upon motion by a party or by the person from whom discovery is sought, or by the hearing officer on his or her own motion, the hearing officer may enter a protective order with respect to this material.*

*(2) Prior to granting a protective order, it must be established by the moving party that the information sought to be protected is entitled to be treated as a trade secret or is*

*otherwise confidential. A party or person seeking a protective order shall have the opportunity to be heard on all issues relevant to preserving the record's confidentiality, including, but not limited to, the following:*

*(A) The appropriate scope and terms of any governing protective order;*

*(B) The terms under which the record may be placed in evidence or otherwise used at a hearing; and*

*(C) The disposition of the record and any copies thereof after all relevant administrative and judicial proceedings have concluded.*

*(3) A party or person seeking a protective order may be permitted to make all, or part of, the required showing in a closed meeting. The hearing officer shall have discretion to limit attendance at any closed meeting proceeding to the hearing officer and the person or party seeking the protective order.*

*(4) A protective order, if granted, shall contain terms governing the treatment of the information which are appropriate under the circumstances to prevent disclosure outside the hearing. The protective order may order that the trade secret information not be disclosed or that it be disclosed only to specified persons, or in a specified way. Disclosure may be limited to counsel for the parties who shall not disclose such information to the parties themselves. Disclosure to specified persons shall be conditioned on execution of sworn statements that no disclosure of the information will be made to persons not entitled to receive it under the terms of the protective order.*

*(5) The protective order shall contain terms governing the treatment of the information which are appropriate under the circumstances to prevent disclosure outside the hearing; the order may require that the material be kept under seal and filed separately from other evidence and exhibits in the hearing.*

*(6) Any party subject to the terms and conditions of any protective order, desiring to make use of any documents or testimony obtained in a closed meeting, shall file a motion to the hearing officer and set forth justification for the request. The motion shall be granted upon a demonstration of good cause that the information is relevant and has significant probative value on a disputed issue of material fact in issue. In granting the motion, the hearing officer shall enter an order protecting the rights of the affected persons and parties, who have claimed that the information is confidential, by preventing any unnecessary disclosure of the information. The hearing officer may require that the information be presented in a closed meeting, with attendance limited, as necessary and practicable, to specified representatives of the parties and that the material be sealed and filed separately from other evidence and exhibits in the hearing.*

*(7) The hearing office shall make a record of all closed meetings that are held under this section. The record shall be sealed and made available, upon appropriate order, to the state board or to the court review of the record.*

*(8) If the hearing officer denies a motion for protective order or grants a protective order only, in part, the order shall not become effective until ten days after the date the order is served. In the interim, a party to the proceeding or third-party holder of the asserted confidential information adversely affected by the order may seek appropriate interlocutory relief in a court of competent jurisdiction.*

*(e) Proceeding to Compel Discovery.*

*(1) Any party claiming that its request for discovery pursuant to this section has not been complied with or that the opposing party has failed to comply with a stipulated agreement to provide discovery may serve and file with the hearing officer a motion to compel the party who has refused or failed to produce the requested or stipulated discovery to comply. The motion shall include the following:*

*(A) Facts showing the party has failed or refused to comply with a discovery request or stipulation;*

*(B) A description of the information sought to be discovered;*

*(C) The reasons why the requested information is discoverable;*

*(D) Evidence that a reasonable and good faith attempt to contact the noncomplying party for an informal resolution of the issue has been made; and*

*(E) To the extent known by the moving party, the measures for the noncomplying party's refusal to provide the requested information.*

*(2) The motion shall be filed within 15 days after the date the requested information was to be made available for inspection and copying or the date a deposition was scheduled to take place and served upon the party who has failed or refused to provide discovery.*

*(3) The hearing on the motion to compel discovery shall be held within 15 days after the motion is filed, or a later time that the hearing officer may on his or her own motion for good cause determine. The party who has refused or failed to provide discovery shall have the right to serve and file a written answer or other response which shall be due at the hearing office and personally served on all parties at least three days prior to the date set for hearing.*

(4) *Where the matter sought to be discovered is under the custody or control of the party who has refused or failed to provide discovery and that party asserts that the matter is not a discoverable matter under this section, or is privileged against disclosure, the hearing officer may order that the party in custody lodge with the hearing office the matters identified in subdivision (b) of section 915 of the Evidence Code and the hearing officer shall examine the matters in accordance with those provisions.*

(5) *The hearing officer shall decide the case on the matters examined in a closed meeting, the papers filed by the parties, and such oral argument and additional evidence as the hearing officer may allow.*

(6) *Unless otherwise stipulated by the parties, the hearing officer shall no later than 15 days after the hearing make its order denying or granting the motion. The order shall be in writing setting forth the matters the moving party is entitled to discover. The hearing office shall serve a copy of the order by mail upon the parties. Where the order grants the motion in whole, or in part, the order shall not become effective until ten days after the date the order is served. Where the order denies relief to the moving party, the order shall be effective on the date it is served.*

(7) *If after receipt of an order directing compliance with the provisions of these rules regarding discovery, a party fails, without good cause, to comply with the order, the hearing officer may draw adverse inferences against that party and may prevent that party from introducing any evidence that had been requested and not produced during discovery into the administrative record.*

*NOTE: Authority cited: Sections 39600 and 39601, Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Section 43105, Health and Safety Code; Sections 11189 and 11507.6, Government Code; Section 915(b), Evidence Code.*

**§60055.26. Subpoena and Subpoena Duces Tecum.**

(a) *Subpoenas and subpoenas duces tecum may be issued for attendance at a hearing and for production of documents at any reasonable time and place or at a hearing.*

(b) *Subpoenas and subpoenas duces tecum shall be issued by the hearing officer assigned to a proceeding, general counsel, or executive officer at the request of a party or, if represented by an attorney, the attorney of record for a party in accordance with sections 1985-1985.4 of the California Code of Civil Procedure.*

*(c) The custodian of documents that are the subject of a subpoena duces tecum may satisfy the subpoena by delivery of the documents or a copy of the documents, or by making the documents available for inspection or copying, together with an affidavit in compliance with section 1561 of the Evidence Code.*

*(d) The process extends to all parts of the state and shall be served in accordance with sections 1987 and 1988 of the California Code of Civil Procedure. A subpoena or subpoena duces tecum may also be delivered by certified mail return receipt requested or by messenger. Service by messenger shall be effected when the witness acknowledges receipt of the subpoena to the sender, by telephone, by mail, or in person, and identifies himself or herself either by reference to date of birth and driver's license number or Department of Motor Vehicles identification number, or the sender may verify receipt of the subpoena by obtaining other identifying information from the recipient. The sender shall make a written notation of the acknowledgment. A subpoena issued and acknowledged pursuant to this section has the same force and effect as a subpoena personally served. Failure to comply with a subpoena issued and acknowledged pursuant to this section may be punished as a contempt and the subpoena may so state. A party requesting a continuance based upon the failure of a witness to appear at the time and place required for the appearance or testimony pursuant to a subpoena, shall prove that the party has complied with this section. The continuance shall only be granted for a period of time that would allow personal service of the subpoena and in no event longer than that allowed by law.*

*(e) No witness is obliged to attend unless the witness is a resident of the state at the time of service.*

*(f) Upon timely motion of a party or witness, or upon his or her own motion, after notice to the parties and an opportunity to be heard and upon a showing of good cause, the hearing officer may order the quashing of a subpoena or subpoena duces tecum entirely, may modify it, or may direct compliance with it upon other terms or conditions. In addition, the hearing officer may make any other order as may be appropriate to protect a party or witness from unreasonable or oppressive demands.*

*(g) The state board may quash a subpoena or a subpoena duces tecum that it has issued on its own motion.*

*(h)(1) In the case of the production of a party to the record of a proceeding or of a person for whose benefit a proceeding is prosecuted or defended, the service of a subpoena on the witness is not required if written notice requesting the witness to attend, with the time and place of the hearing, is served on the representative of the party or person.*

(2) *Service of written notice to attend under this section shall be made in the manner and is subject to the conditions provided in section 1987 of the California Code of Civil Procedure for service of written notice to attend in a civil action or proceeding.*

(i) *A witness other than an employee of the state or a political subdivision thereof appearing pursuant to a subpoena or a subpoena duces tecum, other than a party, shall receive the same mileage, and appearance fees allowed by law; such fees are to be paid by the party at whose request the witness is subpoenaed.*

*NOTE: Authority cited: Sections 39600, 39601 and 43028, Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 43150 and 43028, Health and Safety Code; Sections 11186 - 11188, 11450.05 - 11450.30, Government Code; Section 1561, Evidence Code, Sections 1985 - 1985.4, 1987 and 1988, California Code of Civil Procedure.*

**§ 60055.27. Witness Lists.**

(a) *No later than ten days before the scheduled hearing date, the parties shall submit to the hearing office and serve upon the other parties, a list of the names, addresses and qualifications of proposed witnesses and a brief summary of the testimony to be presented by each witness.*

(b) *The hearing officer may prohibit any party from presenting any witness that has not been included on that party's witness list as required under paragraph (a) of this section.*

*NOTE: Authority cited: Sections 39600 and 39601, Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Section 43105, Health and Safety Code.*

**§ 60055.28. Motions for Summary Determination of Issues.**

(a) *Any party may file a motion for summary judgment or summary adjudication of the issues. Such motions shall include supporting legal argument, and where necessary, affidavits showing that there is no genuine issue of material fact for determination regarding the identified issues. A party opposing such a motion shall show by affidavit or other documentation that a genuine issue of material fact as to the issues raised exists. After reviewing the motion and response of the parties, the administrative record, and any arguments of the parties, the hearing officer shall determine whether a genuine issue of material fact as to the issues exists and whether a party is entitled to judgment on the issue(s) as a matter of law.*

*(b) If, upon considering a motion under subparagraph (c), the hearing officer determines that a party is entitled to summary judgment on the issue(s) as a matter of law, the hearing officer shall issue a written decision or order that sets forth necessary findings of fact and conclusions of law regarding all matters that were at issue.*

*(c) Should it appear from the affidavits of a party opposing the motion that the party cannot, for reasons stated, present by affidavit facts essential to justify the party's opposition, the hearing officer may deny the motion or may grant a continuance to permit affidavits to be obtained or to permit such additional discovery as provided under these procedures.*

*(d) The hearing officer shall deny a request for summary determination of the issue(s) if he or she finds the administrative record, including any evidence presented by the parties as part of this motion, present a genuine issue of material fact. If the hearing officer denies a request for summary determination, or denies such a request in part, the hearing officer shall promptly issue to each party a written ruling as to the existence of a genuine issue of material fact on the issue(s) and the reasons for the ruling. The matter shall continue to be set for hearing on all issues for which a genuine issue of material fact exists.*

*NOTE: Authority cited: Sections 39600 and 39601, Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Section 43105, Health and Safety Code.*

#### ***Subarticle 6. Contempt and Sanctions***

##### ***§ 60055.29. Contempt.***

*If any person in proceedings before the hearing officer disobeys or resists any lawful order or refuses to respond to a subpoena, subpoena duces tecum, or refuses to take the oath or affirmation as a witness or thereafter refuses to be examined, or is guilty of misconduct during a hearing or in its immediate vicinity as to obstruct the proceedings, the hearing officer may certify the facts to the Superior Court in and for the county where the proceedings are held for contempt proceedings pursuant to Government Code section 11455.20.*

*Note: Authority cited: Sections 39600 and 39601, Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Section 43105, Health and Safety Code; Sections 11455 and 11525, Government Code.*

**§ 60055.30. Sanctions.**

*(a) Notwithstanding the above, the hearing officer may order a party, a party's representative or both, to pay reasonable expenses, including attorney's fees, incurred by another party as a result of bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay.*

*(1) "Actions or tactics" include, but are not limited to, the making or opposing of motions; the failure to comply with a discovery request or subpoena; or the failure to comply with a lawful order of the hearing officer.*

*(2) "Frivolous" means:*

*(A) Totally and completely without merit; or*

*(B) For the sole purpose of harassing an opposing party.*

*(b) An order for sanctions may be oral on the record or in writing and shall set forth the factual findings which are the basis for the imposition of sanctions.*

*(1) In determining reasonable expenses, the party or parties to whom payment is to be made shall, at the hearing officer's discretion, either make a statement on the record under oath or submit a written declaration under penalty of perjury setting forth with specificity the expenses incurred as a result of the other party's conduct.*

*(2) Within five days of the receipt of the hearing officer's order for the payment of expenses, a party or representative may, on the ground of hardship, request reconsideration from the hearing officer issuing the order. The request for reconsideration shall be filed in writing, and include a declaration under penalty of perjury.*

*(c) The order or denial of an order to pay expenses under paragraph (b) is subject of procedural review in the same manner as a final decision pursuant to Subarticle 11.*

*Note: Authority cited: Sections 39600 and 39601, Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Section 43105, Health and Safety Code; Sections 11455.30 and 11525, Government Code.*

## ***Subarticle 7. Hearings***

### **§ 60055.31. Failure to Appear.**

*If after service of a Notice of Hearing, including Notice of Consolidated Hearing or Continuance, a party fails to appear at a hearing either in person or by representative, the hearing officer may take the proceeding off calendar, or may, at the request of a party, or on his or her own motion, adversely rule against the absent party.*

*NOTE: Authority cited: Sections 39600 and 39601, Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Section 43105, Health and Safety Code.*

### **§ 60055.32. Conduct of Hearing.**

*(a) The hearing shall be presided over by a hearing officer who shall conduct a fair and impartial hearing in which each party has a reasonable opportunity to be heard and to present evidence.*

*(b) The hearing shall be conducted in the English language.*

*(c) Subject to reasonable limitations that may be imposed by the hearing officer, each party to the proceeding shall have the right to:*

*(1) Call and examine witnesses;*

*(2) Introduce exhibits;*

*(3) Question opposing witnesses on any matter relevant to the issues even though that matter was not covered in the direct examinations;*

*(4) Impeach any witness regardless of which party first called the witness to testify;  
and*

*(5) Call and examine an opposing party as if under cross-examination, even if that party does not testify on his or her own behalf.*

*(d) Burden of Going Forth.*

*(1) The executive officer has the initial burden of presenting evidence that those parts of the executive officer decision specifically challenged in the petition for review are supported by the facts and applicable law.*

*(2) After the executive officer presents its evidence, the petitioner shall present documentation, testimony, or other evidence to support all claims made, including any affirmative defenses raised, that are pertinent to the issues presented to the hearing officer for determination.*

*(3) Subject to the hearing officer's authority under subparagraph (e)(1) below, at the close of the petitioner's presentation of evidence, the parties may present rebuttal evidence that is necessary to resolve disputed issues of material fact.*

*(e) The hearing officer may:*

*(1) Limit the number of witnesses and the scope and extent of any direct examination, cross-examination, or rebuttal testimony, as necessary, to protect the interests of justice and conduct a reasonably expeditious hearing;*

*(2) Require the authentication of any written exhibit or statement;*

*(3) Call and examine a party or witness and may, on his or her own motion, admit any relevant and material evidence;*

*(4) Exclude persons whose conduct impedes the orderly conduct of the hearing;*

*(5) Restrict attendance because of the physical limitations of the hearing facility; or*

*(6) Take other action to promote due process or the orderly conduct of the hearing.*

*(f) The taking of evidence in a hearing shall be controlled by the hearing officer in the manner best suited to ascertain the facts and safeguard the rights of the parties. Prior to taking evidence, the hearing officer shall define the issues and the order in which evidence will be received. hearing officer shall have discretion to decide whether conferences and informal discussions necessary to facilitate the orderly and expeditious conduct of the case will be conducted in closed session and/or be recorded.*

*(g) Each matter in controversy shall be decided by the hearing officer upon a preponderance of the evidence test, unless otherwise provided under California law.*

*(h) Hearings shall be recorded electronically. The recording made by the Administrative Hearing Office shall be the official recording of the hearing.*

*(1) A verbatim transcript of the official recording will not normally be prepared, but may be ordered by the hearing officer if deemed necessary to permit a full and fair review and*

*resolution of the case. If not so ordered by the hearing officer, a party may, at its own expense, request that a verbatim transcript be made. The party making the request shall provide one copy to the hearing officer and one copy to every other party.*

*(2) The official recording of the hearing and transcript of the recording, together with all written submissions made by the parties, shall become part of the administrative record for the proceeding.*

*NOTE: Authority cited: Sections 39600 and 39601, Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Section 43105, Health and Safety Code.*

**§ 60055.33. Evidence.**

*(a) Testimony shall be taken only under oath or affirmation.*

*(b) The hearing need not be conducted according to technical rules relating to evidence and witnesses. The hearing officer shall admit evidence which is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions, and which is not irrelevant, immaterial, unduly repetitious, or otherwise unreliable or of little probative value. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but upon timely objection shall not be sufficient in and of itself to support a finding unless it would be admissible over objection in civil actions. The application of these rules shall not affect the substantial rights of the parties as provided in the Evidence Code.*

*(c) The rules of privilege shall be effective to the extent that they are otherwise required by statute to be recognized at the hearing.*

*(d) Consistent with the provisions of section 60055.25(d), trade secret and other confidential information may be introduced into evidence. The hearing officer shall take all precautions to preserve the confidentiality of such information, and may make such orders as may be necessary to consider such evidence in a closed meeting, including the use of a supplemental order or decision to address matters which arise out of that portion of the evidence which is confidential.*

*(e) In reaching a decision, official notice may be taken, either before or after submission of the proceeding for decision, of any generally accepted technical or scientific matter within the state board's area of expertise, and determinations, rulings, orders, findings and decisions, required by law to be made by the state board or the hearing officer.*

*(1) The hearing officer shall take official notice of those matters set forth in section 451 of the Evidence Code.*

*(2) The hearing officer may take official notice of those matters set forth in section 452 of the Evidence Code.*

*(3) Each party shall give notice of a request to take official notice and be given reasonable opportunity on request to present information relevant to:*

*(A) The propriety of taking official notice; and*

*(B) The effect of the matter to be noticed.*

*NOTE: Authority cited: Sections 39600 and 39601, Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Section 43105, Health and Safety Code; Sections 451 and 452, Evidence Code.*

**§ 60055.34. Evidence by Affidavit or Declaration.**

*(a) At any time ten or more days prior to a hearing or a continued hearing, a party may mail or deliver to the opposing party or parties a copy of any affidavit or declaration which the proponent proposes to introduce in evidence, together with a notice as provided in subdivision (b). Unless an opposing party, within seven days after such mailing or delivery, mails or delivers to the proponent a request to cross-examine the affiant or declarant the opposing party's right to cross-examine such affiant or declarant is waived and the affidavit or declaration, if introduced in evidence, shall be given the same effect as if the affiant or declarant had testified orally. If an opportunity to cross-examine an affiant or declarant is not afforded after request therefore is made as herein provided, the hearing officer may allow the affidavit or declaration to be introduced, but if it is allowed to be introduced, it shall only be given the same effect as other hearsay evidence.*

*(b) The notice referred to in subdivision (a) shall be in the following form:*

*"The accompanying affidavit or declaration of [insert name of affiant or declarant] will be introduced as evidence at the hearing in [insert title and docket number or petition number of proceeding]. [Insert name] will not be called to testify orally and you will not be entitled to question the affiant or declarant unless you notify [insert name of the proponent, representative, agent or attorney] at [insert address] that you wish to cross-examine the affiant or declarant. To be effective, your request must be mailed or delivered to [insert name of proponent, representative, agent or attorney] on or before [insert a date 7 days after the date of mailing or delivery of the affidavit to the opposing party]."*

*NOTE: Authority cited: Sections 39600 and 39601, Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Section 43105, Health and Safety Code.*

**§ 60055.35. *Exclusion of Witnesses.***

*Upon motion of a party, the hearing officer may exclude from the hearing room any witnesses not at the time under examination; but the parties or their representatives to the proceeding shall not be excluded.*

*NOTE: Authority cited: Sections 39600 and 39601, Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Section 43105, Health and Safety Code.*

**§ 60055.36. *Oral Argument and Briefs.***

*(a) Prior to the close of the hearing, the hearing officer may, on his or her own motion, or upon motion of a party, grant and determine the length of oral argument.*

*(b) Motions to submit written closing argument shall be made prior to the close of the hearing and shall be granted at the discretion of the hearing officer upon a determination that written argument will be productive and will not unreasonably delay the disposition of the proceeding. The hearing officer shall determine the appropriate page lengths of all post hearing briefs at the time he or she determines that the filing of closing arguments is appropriate. A party shall file written closing brief within 15 working days from the date of the hearing. Opposing parties may file a reply brief within 10 working days from service of the argument. The hearing officer may extend or reduce the above filing dates for submission of written argument for good cause.*

*NOTE: Authority cited: Sections 39600 and 39601, Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Section 43105, Health and Safety Code.*

***Subarticle 8. Decisions of the Hearing Officer***

**§60055.37. *Default Order.***

*(a) Upon motion, the hearing officer may find a party to be in default upon failure, without good cause to appear at a scheduled conference or hearing; or to comply with an order of the hearing officer.*

*(b) A default by the petitioner shall result in dismissal of the petition, with prejudice.*

*(c) A default by the executive officer shall result in reversal of the decision of the executive officer that is under review.*

*(d) Any proceeding may be reinstated by the hearing officer upon a showing of good cause that contains sufficient facts to show or establish a reasonable basis for the failure to appear at the hearing. The request for reinstatement shall be made by the defaulting party within 30 days of service of the default order.*

*NOTE: Authority cited: Sections 39600 and 39601, Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Section 43105, Health and Safety Code.*

***§ 60055.38. Proposed Order or Decision of the Hearing Officer after Petition for Review Hearing; Order or Decision of the Board.***

*(a) Unless otherwise ordered, all hearings on petitions for review shall be submitted at the close of the hearing unless otherwise extended by the hearing officer or provided in these rules. Within a reasonable period of time after the proceeding is submitted, the hearing officer shall make findings upon all facts relevant to the issues for hearing, and file a proposed order or decision with the reasons or grounds upon which the order or decision was made.*

*(b) The proposed order or decision shall be in writing, signed and dated by the hearing officer deciding the proceeding.*

*(c) The hearing officer shall immediately certify the administrative record and forward it, together with a copy of the proposed order or decision, to the clerk of the board. Within 30 days after receipt of the proposed order or decision, the clerk of the board shall serve a copy of the proposed order or decision on each party to the proceeding or its representative and shall issue a public notice that the state board will conduct a public hearing to consider adoption of the proposed order or decision. At the public hearing, the state board may take any of the following actions:*

*(1) Adopt the proposed order or decision in its entirety.*

*(2) Make technical or other minor changes to the proposed order or decision and adopt it as its own. Actions under this subparagraph are limited to clarifying or other changes that do not affect the factual or legal basis of the proposed decision.*

*(3) Refer the matter back to the hearing officer for the taking of additional evidence, or order that additional evidence be taken at a hearing before the state board itself. If the matter is remanded to the hearing officer, the hearing officer shall issue and serve upon the*

*parties a new proposed order or decision based upon the new evidence that has been received. In such an event, the state board shall consider the newly proposed order or decision under the procedures set forth in this section.*

*(4) Issue its own written order or decision, based on the administrative record and any additional evidence presented during the public hearing, setting forth findings of fact and conclusions of law regarding all issues necessary to support the order or decision.*

*(d) The clerk of the state board shall serve a copy of the order or decision of the state board on the petitioner, other parties to the proceedings, and any member of the public who has requested a copy. The state board shall specify in the order or decision the date that order or decision becomes effective.*

*NOTE: Authority cited: Sections 39600 and 39601, Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Section 43105, Health and Safety Code.*

### ***Subarticle 9. Reconsideration***

#### ***§ 60055.39. Reconsideration by the State Board.***

*A party aggrieved by an order or decision of the state board relating to a petition for review of an executive officer decision pursuant to section 60055.38 of these rules, or an initial determination by the hearing officer that a hearing to consider a petition is not required by law, pursuant to section 60055.17 of these rules, may within 20 days of service of such order or decision, request that the state board reconsider its order or decision with respect to any matters covered therein. The request for reconsideration shall be filed with the clerk of the state board and shall be served on all parties and the hearing office. The request shall be deemed filed the date it is delivered or mailed to the clerk of the state board.*

*Note: Authority cited: Sections 39600 and 39601, Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Section 43105, Health and Safety Code.*

#### ***§60055.40. Requirements in Filing Request for Reconsideration; Comments Opposing Request.***

*(a) A request for reconsideration of a state board's order or decision regarding a petition for review of an executive officer decision shall be signed by the party or its representative and verified under oath. The request shall be based upon one or more of the following grounds:*

*(1) The hearing officer or the state board acted without or in excess of its powers;*

- (2) *The order or decision was procured by fraud;*
- (3) *The order or decision is not supported by the evidence or the findings of fact;*
- (4) *The requesting party has discovered new material evidence that could not, with reasonable diligence, have been discovered and produced at the hearing; or*
- (5) *The hearing officer and/or the state board have misapplied applicable law.*
- (b) *Any request for reconsideration shall specifically detail the grounds upon which the requesting party considers the order or decision to be unjust or unlawful and every issue to be considered on reconsideration. The requesting party shall be deemed to have fully waived all objections, irregularities, and illegalities concerning the proceeding upon which reconsideration is sought other than those specifically set forth in the request for reconsideration. The request for reconsideration will be denied if it contains no more than allegations of the statutory grounds for reconsideration, unsupported by specific references to the record and principles of law involved.*
- (c) *When a request for reconsideration or answer thereto has been timely filed, the filing of supplemental papers or answers may be granted at the discretion of the state board. Parties requesting a copy of the hearing record shall bear the cost of reproduction.*
- (d) *The request for reconsideration may include a request that the order or decision of the state board be stayed pending resolution of the request for reconsideration. As provided in section 60055.41, the order or decision shall be automatically stayed for 20 days from the date of filing of the request for reconsideration.*
- (e) *Within ten days of being served with notice of a request for reconsideration, a party opposed to the request may file an opposition to the request with the clerk of the state board. The opposition shall be signed and verified under oath by the party or its representative and shall not exceed six pages.*

*Note: Authority cited: Sections 39600 and 39601, Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Section 43105, Health and Safety Code.*

**§60055.41. Decision on Reconsideration; Stays; Summary Denial.**

- (a) *The state board may upon the request of a party or its own motion, stay, suspend, or postpone the order or decision that it has issued while the request for reconsideration is pending.*

*(b) The state board shall be deemed to have summarily denied the request for reconsideration if it fails to act upon the request for reconsideration within 20 days from the date of filing of the request. The state board may, for good cause, extend the time within which the petition for reconsideration must be acted upon for a period not to exceed ten days. The state board shall issue an order notifying the parties of its decision summarily denying the request for reconsideration.*

*(c) Upon summary denial of the request for reconsideration, the order or decision of the state board shall become final.*

*(d) If the request for reconsideration has not been summarily denied pursuant to subparagraph (b) above, the state board may within 45 days after receipt of the request for reconsideration:*

- (1) Review some, but not all issues raised by the request;*
- (2) Delegate its review authority to one or more persons, subject or not subject to, further review by the state board;*
- (3) Affirm, rescind, or amend the findings and conclusions of law, of the order or decision; or*
- (4) Direct the taking of additional evidence either by submission or further hearing.*
  - (A) If the state board orders the parties to submit additional evidence, notice and an opportunity to respond shall be given to all parties.*
  - (B) If the state board orders that additional evidence be taken at a further hearing conducted by the state board or the hearing officer assigned to the case and that additional findings of fact be made, notice of the time and place of the hearing shall be given to all parties and to such other persons that may be affected by the order.*
  - (C) The issues on further hearing shall be limited to those set forth in the order issued by the state board.*
  - (D) The time limits in section 60055.38 of these rules for filing an order or decision shall not apply to further hearings during reconsideration.*

*NOTE: Authority cited: Sections 39600 and 39601, Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Section 43105, Health and Safety Code; Section 1140.10, Government Code.*

## ***Subarticle 10. Final Order or Decision; Judicial Review***

### **§ 60055.42. Final Order or Decision; Effective Date.**

*(a) If no request for reconsideration of state board's order or decision is filed within 20 days of the service of an order or decision, the initial order or decision of the state board shall become final. The effective date of the final order or decision shall be the date set forth in the state board's initial decision.*

*(b) If a request for reconsideration has been filed but summarily denied because the state board has not taken any action on the request within 20 days after receipt of the request, the initial order or decision of the state board shall become final. The effective date of the order or decision becoming final shall be the date that the order summarily denying the request for reconsideration was served on the parties.*

*(c) If reconsideration has not been summarily denied, the order or decision of the state board that addresses and fully disposes of the request for reconsideration is the final order or decision. The effective date of the order or decision shall be the date that the order or decision was served on the parties.*

*NOTE: Authority cited: Sections 39600 and 39601, Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Section 43105, Health and Safety Code.*

### **§ 60055.43. Judicial Review.**

*(a) A party adversely affected by the a final decision of the state board, upon reconsideration, may seek judicial review by filing a petition for a writ of mandate in accordance with section 1094.5 of the California Code of Civil Procedure. The right to petition shall not be affected by the failure to seek reconsideration before the agency. Such petition shall be filed within 30 days after the order or decision becomes final.*

*(b) The state board may seek to enforce a final order or decision in superior court in accordance with applicable law.*

*NOTE: Authority cited: Sections 39600 and 39601, Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Section 43105, Health and Safety Code; Section 1094.5, California Code of Civil Procedure.*